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SUPREME COURT OF THE UNITED STATES.

No. ~~215.~~ 161.

HAMILTON J. McCOOL, PLAINTIFF IN ERROR,

vs.

SPENCER SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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133

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No. 245.

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THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

Pleas in the Circuit Court of the United States of America for the Northern District of Illinois, held at the United States Court room in the city of Chicago, before the Honorable Thomas Drummond, Judge of the District Court, sitting pro tempore in the absence of the Honorable John McLean, one of the Justices of the Supreme Court of the United States, and Judge of said District, and on Saturday, the fourteenth day of July, eighteen hundred and sixty, and of the Independence of the United States the eighty-fifth year.

WM. H. BRADLEY, *Clerk.*

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } In Ejectment.

Be it remembered that, on the second day of July, eighteen hundred and fifty-five, said plaintiff, by Wead and Harding, his attorneys, came and filed his declaration and notice in ejectment, together with their bond for costs, which read in the words and figures following, to wit:

Declaration and Notice.

United States of America,
State of Illinois. } *ss.*

Circuit Court of the United States of the Northern District of the State of Illinois, at Chicago, July Term, A. D. 1855.

Hamilton J. McCool, who is a citizen of the State of Illinois, was summoned to answer unto Spencer Smith, who is a citizen of the State of Missouri, of a plea of trespass and ejectment; for that, whereas, heretofore, to wit: on the first day of May, in the year eighteen hundred and fifty-five, at and within the county of Warren, in the State of Illinois, in the Northern District of the Circuit Court of the United States, for said State, the said plaintiff was possessed, as of his own demesne in fee simple, of a certain tract of land situate at and within the said County, District and State, and known as the Northeast quarter of Section eleven, in Township ten, Northern Range, one, West of the fourth principal meridian, which land exceeds in value five hundred dollars, and the said plaintiff, being then and there possessed of said premises, he, the said defendant, then afterward, to wit: on the day and year aforesaid, entered into the said described premises, and from the time last aforesaid has unlawfully withheld and does now

unlawfully withhold from the said plaintiff the possession of the said premises, to the damage of the said plaintiff the sum of one hundred dollars, and therefor he brings suit, &c.

WEAD & HARDING,
Attorneys for Plaintiff.

To Mr. Hamilton J. McCool:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which copy this notice is subjoined, will be filed in the Circuit Court of the United States, for the Northern District of Illinois, at Chicago, in said State of Illinois, on the first day of the next July term thereof, A. D. 1855, or as soon thereafter as counsel may be heard, and that upon filing the same a rule will be entered, requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated this 1st day of May, A. D. 1855.

WEAD & HARDING,
Att'ys for Plaintiff.

United States of America, State of Illinois. } *ss.*

Circuit Court of the United States for the Northern District of the State of Illinois, at Chicago, July Term, A. D. 1855.

Spencer Smith, *vs.* Hamilton J. McCool. } In Ejectment.

Stipulation for Costs.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the officers of this Court, in pursuanee of the laws of this State.

Dated this 1st day of May, A. D. 1855.

WEAD & HARDING.

State of Illinois, Warren County. } *ss.*

Circuit Court of the United States, for the Northern District in the State of Illinois, at Chicago, July Term, A. D. 1855.

Spencer Smith, *vs.* Hamilton J. McCool. } Ejectment.

James McCoy, being duly sworn, deposes and says, that he did,

on the 4th day of May, A. D. 1855, personally served Hamilton J. McCool, the defendant in this suit, who is the actual occupant of the premises for which this action was brought, with a true copy of the declaration hereunto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and likewise hereunto annexed, and further this deponent saith not.

JAMES McCOY, *Sheriff.*

[SEAL.] Subscribed and sworn to, before me, this (11th) eleventh day of May, A. D. 1855.

WM. BILLINGS, *Clerk.*

(Endorsed.)
Filed, July 2d, 1855.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the second day of July, eighteen hundred and fifty-five, of the July Term of said Court, for said year, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool } Ejectment.

Rule to Plead.

Now comes the plaintiff, by his attorney, and files his declaration in ejectment, together with a notice thereto attached, and also an affidavit of due service of a true copy of said declaration and notice upon the defendant; and on motion of the plaintiff, by his attorney, it is ordered by the Court, that the cause be docketed, and that the defendant plead thereto within twenty days, or that his default be entered.

And afterwards, to wit, on the fourth day of July, eighteen hundred and fifty-five, the said defendant, by Williams, Lawrence & Williams, his attorneys, comes and enters his appearance, and files the following plea, to wit:

Hamilton J. McCool
ads.
Spencer Smith. }

Plea.

And the said defendant comes, &c., and says, that he is not guilty of withholding the possession of the said premises from the said , in manner and form as the said plaintiff has in his declaration complained against him, and of this he puts himself upon the country, &c.

WILLIAMS, LAWRENCE & WILLIAMS.

(Endorsed.)
Filed July 4, 1855.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on Wednesday, the twenty-third day of July, eighteen hundred and fifty-six, of the July Term of said Court, among the record of the proceedings of said Court in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } In Ejectment.

Order of Continuance.

By agreement of the parties, by their attorneys,
It is ordered by the Court, that this cause be continued until the next term of this court.

And afterwards, to wit, on the tenth day of February, eighteen hundred and fifty-seven, of the December Term of said Court, for the year eighteen hundred and fifty-six, in the record of the proceedings of said Court in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Trial and Finding of Jury.

Now comes the defendant, by A. Williams, Esq., his attorney, and moves the court that a jury be empanneled to try the issue joined upon the plea of the defendant, heretofore filed by his attorney. It is thereupon considered by the Court that a jury come to try said issue, and thereupon come a jury of good and lawful men, to wit: John A. Jamison, E. Van Buren, John S. Wilcox, George Scoville, E. W. Smith, Franklin Webster, Hiram L. Lewis, M. Andrich, William D. Cassin, P. W. Peckham, F. M. Lathrop and Thomas Hoyne, who were duly elected, tried and sworn, and after hearing the evidence, the jury returned into court the following verdict, to wit: "We, the jury, find the defendant not guilty of unlawfully withholding from the possession of the plaintiff the real estate and premises described in his declaration.

It is thereupon considered and adjudged by the Court that the defendant have and recover of the plaintiff his costs by him about his defence in this behalf expended, amounting to the sum of dollars and cents, and that he have an execution therefor.

And afterwards, to wit, on Monday the thirteenth day of July, eighteen hundred and fifty-seven, of the July Term of said Court,

for said year, in the record of the proceedings of said Court, in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Motion for a New Trial.

Now come the parties, by their attorneys, and now come on to be heard the motion of the defendant heretofore filed, for a new trial herein, which, after argument, is taken under advisement by the Court.

And afterwards, to wit, on Wednesday the fifteenth day of July, eighteen hundred and fifty-seven, of the July Term of said Court, aforesaid, in the record of the proceedings of said Court, in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Order granting New Trial.

The Court having fully considered, and being now sufficiently advised upon the motion heretofore made by the defendant for a new trial, herein sustains the same.

And afterwards, to wit, on Thursday, the fifteenth day of October, eighteen hundred and fifty-seven, of the October Term of said Court, for the year eighteen hundred and fifty-seven, in the record of the proceedings of said Court, in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Order dismissing cause.

Now comes the said defendant, by his attorney, and the plaintiff being now three times solemnly called, comes not, but makes default. It is thereupon considered by the Court, on motion of the defendant, by his attorney, that this cause be dismissed at the costs of the plaintiff, for want of prosecution, and that the defendant have and recover of the plaintiff, his costs by him about his suit in this behalf expended, amounting to the same of dollars and cents, and have execution therefor.

And afterwards, to wit, on Tuesday the twelfth day of January, eighteen hundred and fifty-eight, of the December Term, eighteen hundred and fifty-seven of said Court, in the record of the proceedings of said Court in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Order dismissal set aside.

By agreement of the parties, by their attorneys, as per stipulation filed, it is ordered by the Court, that the order of dismissal entered in this cause on the fifteenth day of October, A. D. 1857, be set aside and vacated, and the cause reinstated upon the docket, and that the plaintiff pay all the costs which have accrued herein up to this time, and that execution issue therefor.

And afterwards, to wit, on Friday the fifteenth day of January, eighteen hundred and fifty-eight, of the December Term of said Court, aforesaid, in the record of the proceedings of said Court, in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Order of continuance.

By agreement of the parties, by their attorneys, it is ordered by the Court, that this cause be continued until the next July Term.

And afterwards, to wit, on Thursday, January twentieth, eighteen hundred and fifty-nine, of the December Term of said Court, for the year eighteen hundred and fifty-eight, in the record of the proceedings of said cause in said Court, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Trial.

Now come the parties, by their respective attorneys, and upon issue joined thereupon, come a jury of good and lawful men, to wit: Edward Matthews, Joseph P. Burner, Matthew Taggart, Robert Atkinson, Darwin Wilber, James S. Speed, R. W. Carson, Edward B. Hanna, William Bacon, Robert H. Howe,

Daniel Mullins, and James R. White, who were duly elected, tried and sworn, well and truly to try the issue herein, and after hearing the evidence and agreements of counsel, and receiving instructions from the Court, the Jury retired to consider of their verdict.

And afterwards, to wit, on Wednesday the ninth day of February, eighteen hundred and fifty-nine, of the December Term of said Court, aforesaid, in the record of the proceedings of said Court, in said cause, is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Verdict of the Jury.

The further trial of this cause having been postponed by agreement of the parties, by their attorneys, and now come again the parties, by their attorneys, and now come the jury heretofore empanneled in this cause, and return into Court the following verdict, to wit: we the jury find the defendant guilty of unlawfully withholding from the possession of the plaintiff, the real estate and premises described in the plaintiff's declaration as follows, to wit: a certain tract of land, situate at and within the County of Warren, in the State and Northern District of Illinois, and known as the north-east quarter of section eleven, in Township ten, north in range, one west of the fourth principal meridian. We further find the estate established in the plaintiff on trial, to be an estate in fee simple, and assess his damages at the sum of one cent. Whereupon the defendant, by his attorney, moves the Court for a new trial herein.

And afterwards, to wit, on Saturday, the seventeenth day of July, eighteen hundred and sixty, of the July Term of said Court for the year aforesaid, in the record of the proceedings of said Court in said cause is the following entry, to wit:

Spencer Smith
vs.
Hamilton J. McCool. } Ejectment.

Motion for new trial overruled, and Judgment Entry.

The Court having fully considered and being now fully advised upon the motion of the defendant, heretofore made, for a new trial of this cause, overrules said motion.

It is thereupon considered by the Court that the plaintiff have and recover of the defendant possession of the said described premises, according to the form, force, and effect of his said re-

covery and that, he have a writ of possession therefor; and that he also have and recover of the defendant the said sum of one cent, his damages so as aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of thirty-six dollars and thirty-five cents, and that he have execution therefor.

And afterwards, to wit, on the seventeenth day of July, eighteen hundred and sixty, the following bill of exceptions taken in said cause was filed in the office of the Clerk of the Circuit Court of the United States for the Northern District of Illinois, and is in the words and figures following, to wit:

Spencer Smith
vs.
Hamilton J. McCool.

Bill of Exceptions.

Be it remembered that on the trial of this case, the jury empanneled herein found the following special verdict as to the facts: "We, the jury, find that the N. E. 11, 10 N. 1, W., the land mentioned in the said declaration, was on the 7th day of June, 1818, duly granted by the United States to Alonzo Redman, for his military services in the late war between the United States and Great Britain; that said Redman was the illegitimate son of Polly Norris; that said Polly Norris had three other illegitimate children named Eleanor Fogg, Joseph Melcher, and Sophia Norton; that Eleanor Fogg died without issue in the year 1824; that Joseph Melcher died without issue in the year 1814; that Alonzo Redman died without issue in the year 1825; that Polly Norris died without any other issue than as above stated in the year 1837; that Sophia Norton married Reuben Rand in the year 1816; that Reuben Rand died in June, 1853; that Sophia Rand, on the 23d day of June, 1854, by her quit claim deed of that date duly executed, conveyed said land to one Levi F. Stevens; that said Stevens, on the 21st day of April, 1855, by his quit claim deed of that date, duly conveyed said land to Spencer Smith, the plaintiff.

That the General Assembly of the State of Illinois passed an Act, entitled, an Act to amend an Act concerning the descent of real property in this State, approved February 12, 1853, which Act was approved by the Governor on the 16th day of February, 1857, which Act is in the words and figures following, viz:

"Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that in all cases where any person shall have died, leaving any real property, before the passage of the Act to which this is an amendment, which, by the provisions of the Act to which this is an amend-

ment, would have descended to any illegitimate child or children, such child or children shall be deemed and adjudged to be the owner of such real property, the same as if such Act had been in force at the time of such death, unless such property shall have been proceeded against, and the title thereto vested in the State, or other persons, under the law of this State, concerning escheats.

"Section 2. In all such cases, hereinbefore specified, where any such illegitimate child or children shall have sold and conveyed such real property by deed duly executed, or where the same would have descended by the provisions of the Act to which this is an amendment, and shall have been conveyed by deed by the person to whom the same would have descended, then such conveyances shall vest the same title thereto in the grantee, as by this Act is vested in such illegitimate child from the date of such deed, and in all actions and courts, such grantee shall be deemed to be the owner of such real property from the time of the date of the conveyance.

"Section 3. This act shall be in force from and after its passage."

That said lands have never been proceeded against, and the title thereto vested in the State or other persons, under the law of this State concerning escheats.

We further find, that John Brown, collector of taxes, in and for the county of Warren, and State of Illinois, did on the 25th day of May, 1840, sell said land to Isaac Murphy, for the taxes due to the State and county aforesaid, upon said land, for the year 1839, and that he did on the 9th day of September, 1843, in pursuance of said sale by deed of that date, convey said land to the said Murphy, that said collector, in making such sale and conveyance, did not comply with the law authorising the sale of lands for taxes, and that said deed was for that reason invalid as a conveyance of the legal title. That said Murphy claiming said land in good faith, under said deed, improved, occupied and cultivated the same, and paid all the taxes assessed thereon, for and during the years 1843, 1844, 1845, and 1846. That said Murphy, on the 7th day of April, 1847, by his deed of that date, conveyed the said land to Hamilton J. McCool, the defendant, who immediately thereafter, took possession thereof, and has been in the actual possession thereof ever since, claiming the same in good faith, under said conveyances, and that he has paid all the taxes assessed upon said land, for and during the years 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, and 1856. That the taxes so paid to the said State and County, by the said Murphy and McCool, amount to the sum of one hundred and nine dollars. If from these facts the Court is of the opinion that the plaintiff is entitled to recover, &c., then we find for the plaintiff, and that said plaintiff is the owner of the land, in fee simple

and assess his damages at one cent, otherwise we find for the defendant.

And the Court being of opinion, under the facts as found by the jury, that the plaintiff was entitled to recover, the verdict of the jury was rendered in conformity with such opinion of the Court, as entered of record, February 9th, 1859, to which opinion of the Court, upon the law of the case, under the facts as found by the jury, the defendant then and there excepted.

Exceptions allowed, February 9, 1859.

THOMAS DRUMMOND. [SEAL.]

[Endorsed.]
Filed, July 17, 1860.
WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the seventeenth day of July, eighteen hundred and sixty, the said defendant sued out of the clerk's office of the Court aforesaid, a writ of error in the words and figures following, to wit:

United States of America, }
Northern District of Illinois. } *ss.*

Writ of Error.

The United States of America to the Judges of the Circuit Court of the United States, for the Northern District of Illinois, Greeting:

Because, in the records and proceedings, as also in the rendition of a judgment in a plea which is in the said Court before you, between Spencer Smith, plaintiff, and Hamilton J. McCool, defendant, a manifest error hath happened, to the great damage of the said Hamilton J. McCool, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this seventeenth day

[L. S.] of July. in the year of our Lord, one thousand eight hundred and sixty, and of Independence the eighty-fifth year.

WILLIAM H. BRADLEY,
Clerk.

Endorsed.—Filed, July 17, 1860.

WILLIAM H. BRADLEY,
Clerk.

And afterwards, to wit, on the twentieth day of July, eighteen hundred and sixty, the following appeal bond was filed in the clerk's office of said Court aforesaid, and reads as follows, to wit:

Bond in Appeal.

Know all men by these presents, that we, Hamilton J. McCool, Timothy Moshier and Archibald Williams, are held and firmly bound unto Spencer Smith, in the penal sum of one thousand dollars, to be paid to the said Spencer Smith, and to his executors and administrators, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. In witness whereof, we have hereunto signed our names and set our seals, this 20th day of July, 1860.

Provided, however, and this obligation is upon the express condition, that whereas, the above named Hamilton J. McCool, has prosecuted a writ of error to the Supreme Court of the United States, to reverse a certain judgment rendered by the Circuit Court of the United States, in and for the Northern District of Illinois, at the July Term thereof, A. D. 1860, in favor of said Spencer Smith, and against said Hamilton J. McCool. Now, therefore, the condition of this obligation is such, that if the above-named Hamilton J. McCool, shall prosecute his said writ of error to effect, and shall pay all costs, if he shall fail to make good his plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

H. J. McCOOL, [SEAL.]
TIMOTHY MOSHIER, [SEAL.]
ARCHIBALD WILLIAMS, [SEAL.]

Signed, sealed and delivered,
in presence of

JOSIAH GALE.

Approved.

THOMAS DRUMMOND.

Citation.

And afterwards, on the third day of August, eighteen hundred and sixty, a citation in said cause was filed in the office of the Clerk of said Court aforesaid, and reads in the words and figures following, to wit:

Citation.

United States of America, *ss.*

To Spencer Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States, for the Northern District of Illinois, wherein Hamilton J. McCool is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, one of the
[SEAL.] Justices of said Court, this 19th day of July, A. D. 1860.

THOMAS DRUMMOND.

State of Illinois.

PEORIA. July 22d, 1860.

I accept service of the within citation.

H. M. WEED,
Attorney for
SPENCER SMITH.

(Endorsed.)
Filed, August 3d, 1860.
WM. H. BRADLEY, *Clerk.*

Clerk's Certificate.

Northern District of Illinois, *ss.*

I, William H. Bradley, Clerk of the Circuit Court for the United States, for the Northern District of Illinois, do hereby certify that the above and foregoing is a true and complete record of the record and proceedings had in the cause wherein Spencer Smith was plaintiff, and Hamilton J. McCool is defendant, as the same appears from the records of said Court, now on file in my office, and remaining of custody therein.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said Court, at my office in the city of Chicago, this 11th day of October, A. D. 1860, and of the Independence of the United States the 85th year.

WM. H. BRADLEY, *Clerk.*

$8.00 paid by A. Williams, for this Record.

WM. H. BRADLEY, *Clerk.*

Assignment of Errors.

Hamilton J. McCool
vs.
Spencer Smith.

And the said plaintiff, by his attorney, comes and says that, in the record and proceedings herein, manifest error hath intervened in this: 1st, that the Court rendered judgment in favor of the defendant in error, against the plaintiff in error, when, by the law of the land, it should have been in favor of the plaintiff and against the defendant.

2d. The Court erred in deciding that the said defendant was entitled to recover on the special verdict found by the jury.

3d. The Court erred in instructing the jury to find for the said defendant.

For which, and other errors, apparent on the record herein, the said plaintiff prays that the said judgment may be reversed.

A. WILLIAMS,
Attorney for Plaintiff.

No. .....

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1861.

HAMILTON J. McCOOL,
vs.
SPENCER SMITH.

Error to Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

Mr Williams being on the Bench Mr Browning submits this case on his behalf —

HAMILTON J. McCOOL,
vs.
SPENCER SMITH.

Error to Northern District of Illinois.

This was an action of ejectment brought in the Circuit Court of the United States for the Northern District of Illinois, by the Defendant in error, against the Plaintiff in error, for the recovery of the N. E. 11, 10 N. 1. W., in the County of Warren, and State of Illinois.

The Declaration was served May 11th, 1855, and filed in Court July 2, 1855.

The Defendant filed his plea of the general issue, July 4, 1855.

The case was tried by a jury, January 20th, 1859, who, on the ninth day of February, 1859, rendered the following special verdict, to wit: "We, the jury, find that the N. E. 11, 10 N. 1 W., the land mentioned in the declaration, was on the seventh day of June, 1818, duly granted by the United States, to Alonzo Redman, for his military services in the late war between the United States and Great Britain; that said Redman was the illegitimate son of Polly Norris; that said Polly Norris had three other illegitimate children, named Eleanor Fogg, Joseph Melcher, and Sophia Norton; that Eleanor Fogg died without issue, in the year 1824; that Joseph Melcher died without issue, in the year 1814; that Alonzo Redman died without issue in the year 1825; that Polly Norris died without any other issue than as above stated, in the year 1837; that Sophia Norton married Reuben Rand in the year 1816; that Reuben Rand died in June, 1853; that Sophia Rand, on the 23d day of June, 1854, by her quit claim deed of that date, duly executed, conveyed said land to one Levi F. Stevens; that said Stevens, on the 21st day of April, 1855, by his quit claim deed of that date, duly conveyed said land to Spencer Smith, the Plaintiff; that the General Assembly of the State of Illinois passed "An Act, entitled an act to amend an act concerning the descent of real property in this State, approved February 12, 1853," which act was approved by the Governor on the 16th day of February 1857, and which act is in the words and figures following, viz:

SECTION 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, that in all cases where any person shall have died, having any real property, before the passage of the act to which this is an amendment, which by the provisions of the act to which this is an amendment, would have descened to any illegitimate child or children, such child or children shall be deemed and adjudged to be the owner of such real property the same as if such act had been in force at the time of such death, unless such property shall have been proceeded against, and the title vested in the State or other persons under the law of this State concerning escheats.

SECTION 2. In all such cases hereinbefore specified, where any such illegitimate child or children shall have sold and conveyed such real property by deed duly executed, or when the same would have descended by the provisions of the act to which this is an amendment, and shall have been conveyed by deed by the person to whom the same would have descended, then such conveyances shall vest the same title thereto in the grantee, as by this act is vested in such illegitimate child from the date of such deed, and in all actions and courts, such grantee shall be deemed to be the owner of such real property from the time of the date of the conveyance.

SECTION 3. This act shall be in force from and after its passage.' That said land has never been proceeded against, and the title thereto vested in the State or other persons under the law of this State concerning escheats.

We further find that John Brown, Collector of taxes in and for the County of Warren, and State of Illinois, did on the 25th day of May, 1840, sell said land to Isaac Murphy, for the taxes due to the State and County aforesaid upon said land for the year 1839, and that he did on the 9th day of September, 1843, in pursuance of said sale, by deed of that date, convey said land to the said Murphy; that said Collector in making such sale and conveyance did not comply with the law authorizing the sale of land for taxes, and that said deed was for that reason invalid as a conveyance of the legal title; that said Murphy claiming said land in good faith under said deed, improved, occupied and cultivated the same, and paid all the taxes assessed thereon for and during the years 1843, 1844, 1845, and 1846; that said Murphy, on the 7th day of April,

1847, by his deed of that date, conveyed the said land to Hamilton J. McCool, the defendant, who, immediately thereafter took possession thereof, and has been in the actual possession thereof ever since, claiming the same in good faith under said conveyances, and that he has paid all the taxes assessed upon said land for and during the years 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, and 1856; that the taxes so paid to the said State and County, by the said Murphy and McCool, amounts to the sum of one hundred and nine dollars. If from these facts the Court is of the opinion that the Plaintiff is entitled to recover, &c., then we find for the Plaintiff, and that said Plaintiff is the owner of the land in fee simple, and assess his damages at one cent, otherwise we find for the Defendant."

The Court being of the opinion under the facts so found by the jury, that the Plaintiff was entitled to recover, the verdict of the jury was entered in conformity with that opinion, and judgment entered thereon in favor of the Plaintiff. To which opinion and decision of the Court, the Defendant then and there excepted and, now assigns the same for error.

It is contended that under the ordinance for the government of the Territory North-West of the Ohio River, of 1787, which governed descents in the State of Illinois at the time of Redman's death, said land descended to his mother.

The second section of this ordinance ordains, "that the estate both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grand child to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood."

Redman's mother it is said was his next of kin within the meaning of this section.

If this be so, its effect is to abolish all distinction between legitimate and illegitimate relations, and the father as well as the mother would inherit the estate of their bastard children. This

section expressly abolishes all distinction between kindred of the whole and half blood, and if it had been intended to abolish all distinction between legitimate and illegitimate relations, it would have been done in a similar manner. The phrase "next of kin," like the terms "child, children, descendants, and parents," embraces none but legitimate kindred. The common law of England is the basis of American law, and furnishes our rules of construction. It is a well known rule of that law that bastards have no legal kindred and can inherit nothing from any person, and can transmit inheritance to none but their own legitimate offspring.

When words denoting kindred are used without other additions showing that illegitimates are intended, they include none but legitimate kindred. And this applies to laws as well as to private instruments.

2 Kents Com. 212–13. 4 Kent Com. 413–14.

3 Cruise Dig. Tit. 29, ch. 2, sec. 8, and note.

2 Domat. p. 26, Art. 2455; p. 49, Art. 2497 and 8; p. 88, Art. 2571; p. 211, Art. 2861; p. 280, Art. 3029; p. 283, Art. 3036; p. 178, Articles 2793 and 4.

Illinois Stat. of Wills, sections 46, 47, and 53.

Bayley vs. Mollard, 1 Russel & Mylne, 575; S. C. 4 Cond. Eng. Chancery, R. 565.

Wilkinson vs. Adams, 1 Ves. & Bea. 422.

Swaine vs. Kennedy, 1 Ves. & Bea. 469.

Beachcroft vs. Beachcroft, 1 Madd. 234.

Sherman vs. Angel, 1 Bailey, Eq. R. 351.

Collins vs. Hoxie, 9 Paige, 88.

Durant vs. Friend, 11 Eng. Law and Eq. R. 2.

Owen vs. Bryant, 13 Eng. Law and Eq. R. 217.

Although the laws of Illinois made no provision for descent in case of illegitimates till 1829, they did in many respects distinguish between bastards and legitimate children.

In 1829, after providing that estates in a certain contingency, should descend to the next of kin, they provided that if any single or unmarried woman, having estate either real or personal, in her own right, shall hereafter die, leaving one or more children, deemed in law illegitimate, shuch child or children shall not, on that account, be disinherited; but they and each of them, and their descendants, shall be deemed able and capable in law, to take and

inherit the estate of their deceased mother, in equal parts among them, to the exclusion of all other persons."

If the words "child, children, and next of kin," embraced illegitimate, then this was a work of supererrogation. This law was prospective and did not embrace this case, as Redman died four years before its passage. Besides it provided only that bastards should inherit their mother's property, and not that they should inherit from each other, or that the mother should inherit from them.

To remedy this defect, the act of February 12, 1853, was passed providing "that the rule of descent of all property, of whatsoever kind or nature, real and personal, of any bastard or illegitimate person dying intestate in this Stste, or leaving property or effects therein, shall be as follows, to wit; on the death of any such person intestate, his or her property, estate and effects shall descend to and vest in the widow, or surviving husband and children, as the property and effects of other persons in like cases. In case of the death of any such illegitimate person, leaving no children or descendant of a child or children, then the whole property and estate, rights, credits, and effects, shall descend to and vest in the widow and surviving husband. In case of the death of any such illegitimate person, leaving no widow, surviving husband or descendants, then the property and estate of such person shall descend and vest in the mother and her children, and their descendants; to the mother one half, and the other half to be equally divided between her children and their descendants; the descendants of a child, taking the share of their deceased parent or ancestor. In case of the death of any such illegitimate person, leaving no heirs as above provided, then the property and effects, of whatever kind or nature, shall pass to and vest in the next of kin to the mother of such illegitimate person, in the same manner as the estate of a legitimate person would by the laws now in force pass to the next of kin."

This act, too, was prospective, and did not meet the exigence of this case. And after it had been once tried and decided against the Plaintiff below, he procured the passage of the act of February 16, 1857, copied into the abstract, and now insists that under its provisions he is entitled to recover. And of this opinion was the Court below.

This as a retrospective act impairing existing rights, is to say the least of it, of doubtful validity.

Gaines et. al. vs. Buford, 1 Dana 499.

Holden vs. James, 11 Mass. 404.

Hoke vs. Henderson, 4 Dev. 7.

Walley's Heirs vs. Kennedy, 2 Yerg. 554.

Bank vs. Cooper's Securities, 2 Yerg. 600.

Jones vs. Perry, 10 Yerg. 69.

Picquet's appeal, 5 Pick, 65.

Lewis et. al. vs. Webb, 3 Greenl. 326.

Its validity can only be sustained on the ground that it is a legislative grant of land which belonged to the State. A judgment of escheat was necessary to vest the land in the State, and a grant thereof by the State without such judgment, would be void, or at least the grantee would acquire only such inchoate title as the State had, to be perfected by judgment of escheat. See Illinois Stat., of escheat. Rev. Code 1845-p. 225-

3 Blackstone Com., 259.

Fairfax's divisee vs. Hunter's lessee, 7 Cranch. 625–6; 2 Curtis, 690–1.

Craig vs. Bradford, 3 Wheat, 599; S. C. 4 Curtis, 308.

3 Com. Dig. Tit. Escheat, page 598, bottom paging.

Den vs. Simpson. Cam. & Nor. 192.

Marshall vs. Loveless, Cam. & Nor. 233.

McCrury vs. Allender, 2 Har. & McHen. 409.

Doe vs. Horniblea, 2 Hayw 37.

In proceeding against it as escheated land, the State would have had to make McCool as *terre* tenant, a party to the proceeding, and he could successfully have defended on the ground that he bought the land of the agent of the State, in 1840, had paid the State on it $109 taxes, and had occupied it fourteen years, and thereby acquired a possessory title to it under the statute of limitation. If the State without judgment of escheat had brought this suit, it will hardly be contended that the action could have been maintained, and it is difficult to comprehend how the grantee of the State can be in a better condition than his grantor.

But allowing that the State could, without judgment of escheat, vest in its grantee a perfect title to the land, then the grantee could commence and maintain a suit for its recovery, but he could not

maintain a suit commenced before he acquired his title. At common law, a Plaintiff in ejectment to recover, must show that he was the owner of the land, or entitled to the possession thereof at the time of the commencement of the suit.

The third section of the ejectment statute of Illinois requires the same thing in explicit and emphatic terms. "No person shall recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover possession thereof, or some share, interest or portion thereof, to be proved or established at the trial." This is required by the general law of the land, of every Plaintiff in ejectment, and it is not within the competency of the Legislature to suspend or dispense with this requirement in favor of a particular Plaintiff, as was attempted to be done in this case. Whatever then may be the effect of this act in vesting the title, it can not enable the Plaintiff to maintain this action.

But the act, if valid and sufficient to pass the title to the land, vests it in Sophia Rand or Levi F. Stevens, and not in the Plaintiff below. It vests it in the person who would inherit under the act of 1853, or if he had conveyed, then in his grantee, that is Levi F. Stevens; it is true Stevens attempted to convey to the Plaintiff, but as he had no title to or interest in the land, his conveyance as a grant was void.

3 Jacob Dictionary 194-5, Tit. Grant.

And as he conveyed to the Plaintiff only by quit-claim deed, his after acquired title did not enure to the Plaintiff. Indeed it may well be doubted whether Stevens was a grantee within the meaning of the act, the deed to him also being a quit-claim. Be this as it may however, whatever title passed by the act is vested either in Sophia Rand or Levi F. Stevens, and can avail the Plaintiff below nothing in this action.

Delanny vs. Burnett, 4 Gilman, 493.

Frink et al vs Dart, 14 Illinois, 307.

Phelps et al vs. Kellogg, 15 Illinois, 135.

But the defendant below had a complete bar under the statute of limitations. It had been without an owner from 1825. The Defendant purchased it at a tax sale in 1840 for the State and County taxes of 1839; acquired his deed in 1843, occupied and improved the land, claiming it in good faith under that title from

that time to the present, and had paid all the taxes assessed on it during that time. The limitation law of 1839 provides that:

"Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall for seven successive years continue in such possession, and shall also, during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possessirn, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section." This "shall not extend to lands owned by the United States or this State."

The case of the Defendant below is completely within the provisions of this act. The land did not belong to this State within the meaning of the proviso. It was a derelict, and the State might have become the owner at any time after 1825, but as it neglected to do so for nearly thirty years, and in the meantime sold it to the grantor of the Defendant and received their money for the taxes thereon from 1843 to 1856, it is now too late to assert its dormant inchoate right. If ever there was a case to which the statute rightfully applied, this is one.

One of the grounds upon which statutes of limitations are defended, is the presumption of abandonment of the land by the owner.

The State must be considered as having waived its right to the land.

Com. Dig. Tit. Escheat B 2 p. 599.

Coke L. 268 *a* 2 Hilliards Ab. 189.

3 Cruise Dig. pp. 453-477, Tit. 30, Sects. 8, 9. 14, 15, 16, 18, 19, 25, 26.

Fisher vs. Cockerill, 5 Mon. 133-9.

Brunswick vs. Litchfield, 2 Greenl. 28.

ARCHIBALD WILLIAMS,
Att'y for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

HAMILTON J. McCOOL,

Plaintiff in Error,

vs.

SPENCER SMITH,

Defendant in Error.

POINTS AND AUTHORITIES

For Defendant in Error.

WM. KELLOGG, Counsel for Defendant in Error.

Beach & Barnard, Printers, 14 *South Clark Street, Chicago, Ill.*

1862.

SUPREME COURT

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HAMILTON J. McCOOL,
Plaintiff in Error,

vs.

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POINTS AND AUTHORITIES

For Defendant in Error.

WM. KELLOGG, Counsel for Defendant in Error.

Beach & Barnard, Printers, 14 South Clark Street, Chicago, Ill.

1861.

SUPREME COURT OF THE UNITED STATES.

Hamilton J. McCool,
PLAINTIFF IN ERROR,
VS.
Spencer Smith,
DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT, U. S., NORTHERN DISTRICT, ILLINOIS.

Points and Authorities for Defendant in Error.

This is an action of Ejectment, in which, in the Court below, the defendant in error herein, was plaintiff. As appears from the Bill of Exceptions, (printed Record, page 8–9), the United States, on 7th day of June, 1818, granted to Alonzo Redman, who was the illegitimate son of Polly Norris, the premises described in the declaration. Polly Norris had, also, three other illegitimate children. All the children of said Polly Norris, with the exception of Sophia Norton, died without issue previous to the year 1825. Polly Norris, the mother, died in the year 1837. Sophia Norton, in June, 1816, married Reuben Rand, who died in June, 1853. On the 23d day of June, 1854, Sophia Rand conveyed, by quit-claim deed,

the property in question, to Levi F. Stevens, who, on the 21st day of April, 1855, by quit-claim deed, conveyed the property to the defendant in error. In February, 1857, the General Assembly of the State of Illinois passed "An Act, amendatory of an Act concerning the descent of real property, passed February 12th, 1853," declaring, in effect, that in all cases where any person shall have died leaving any real property before the passage of the Act, to which this is an Amendment, and which, by the provisions of said Act, would have descended to any illigitimate child or children, such child or children shall be deemed and adjudged to be the owner of such real property, the same as if such Act had been in force at the time of such death, unless such property shall have been proceeded against, and the title thereto vested in the State, or other persons, under the laws of the State of Illinois concerning escheats.

The Act of 1857, also, provides that, in all cases, therein and hereinbefore specified, where any such illegitimate child or children shall have sold and conveyed such real property by deed, duly executed, or where the same would have descended by the provisions of the Act to which this Act was an Amendment, and shall have been conveyed by deed to the person to whom the same would have descended—then such conveyance shall vest the same title thereto in the grantee, as, by this Act, is vested in such illegitimate child from the sale of such deed, and in all actions and courts, such grantee shall be deemed to be the owner of such real property from the time of the date of the conveyance.

The property in controvery has never been proceeded against, nor has the title thereto vested in the State, or other persons, under the laws of the State of Illinois, concerning escheats.

Under this state of facts, the rights of the parties to this suit in the property in controversy, rest upon one question, viz: — In whom did the title of that property vest, upon the decease of Alonzo Redman. If in his mother, Polly Norris, then we have further to determine whether, upon her decease, it passed to her only surviving offspring Sophia Norton; both of these questions being affirmatively answered, the title of the defendant in error is indisputable.

The earliest statute regulating descents, and the distribution of real property, in the State of Illinois, is the ordinance of July 13th, 1787. By that ordinance, it is declared that where there shall be no children or descendants, the real estate shall descend, in equal parts, to the *next of kin* in equal degree. This provision of the ordinance of 1787, was re-adopted by the Act of the Legislature of the State of Illinois, approved March 23d, 1819, regulating administration and the descent of intestate estates, and the law upon that point, remained the same, until the Act of January 23d, 1829, entitled "An Act relative to wills and testaments, executors, and administrators, and the settlement of estates," which provides that, where there shall be no children, nor descendants of such children, and no widow—then the estate goes to the parents, brothers and sisters of the deceased person, and their descendants in equal parts among them; and, also, that if there be no children or descendants of children, and no widow, no parents, brothers or sisters, or descendants of brothers or sisters—then the estate descend, in equal parts, to the *next of kin* to the intestate, in equal degree, computing by the rules of the civil law.

Alonzo Redman died in 1825, intestate and without issue, and hence the question as to whom his real property descended, must be determined by the Act of 1819, already referred to.

His estate, by that Act, passed to his *next of kin;* and this leads directly to the consideration of the questions presented in this case, viz:

1. Was Polly Norris, the mother of Alonzo Redman, her *next of kin* at the time of his decease.

2. Was Sophia Norton, the illegitimate child of Polly Norris, capable of inheriting real property, and

3. Is the Act of the General Assembly of the State of Illinois, approved February 16th, 1857, so far as it has a retroactive effect and operation, constitutional.

The affirmative of each of these questions, is insisted upon by the

defendent in error, and in discussing them, in the order above stated, it is insisted—

1. That Polly Norris, the mother of Alonzo Redman, was, at the time of his decease, his next of kin:

Irrespective of the question of the rights of illegitimate children to inherit real property, it may be considered as a well settled principle of law in this country, that a mother is *next of kin* to her son.

The refinements and subtleties of the common law, springing from a system of society, of which, in this country, we have fortunately had no knowledge, have, in a great measure, been discarded — both by legislatures and by courts. The question has, in the State of Illinois, been expressly adjudicated, and the decisions of the highest judicial tribunals of a State, in the construction of statutes of this character, which are rules of property, are as binding and conclusive upon this Court, as the statutes themselves.

Thus in *Hayes vs. Thomas, et al.*, Breese, 180, the Supreme Court of the State of Illinois, holds the following language:

"The first question presented in this case is, who are the next of "kin in equal degree to the intestate? It appears from the bill, "that the intestate died without issue, but that he left a mother, "brothers and sisters.

"According to the computation of the civilians, the father and "mother are related to their children in the first degree, and broth- "ers and sisters in the second. According to the rule of *Hillhouse* "v. *Chester*, 3 Day's Rep. 166, 210, the computation of the civil- "ians is adopted to ascertain who are next of kin, and this rule "prevails whether the expression is used in relation to the descent "of real or personal estate.

"*The Court thinks that the civil law mode of ascertaining who are "next of kin, ought to be adopted in construing our statute, as being "more agreeable to the nature of things and more conformable to "adjudged cases. The mother is, therefore, to be considered the next "of kin to the intestate, and entitled to the whole of her son's estate.*"

This must be regarded as conclusively determining the first question, and establishing the proposition that the mother may be next of kin to her son. And it is insisted that Polly Norris, the mother of Alonzo Redman, the patentee, was his next of kin, notwithstanding the fact that Alonzo Redman was an illegitimate son.

Upon the decease of Alonzo Redman, the property in controversy became by force of the statute of 1819, vested in the mother, (Polly Norris) and upon this branch of the case it only remains to be ascertained whether upon her death it was inherited by Sophia Norton, who was also an illegitimate offspring, and this presents the question:

2. *Whether an illegitimate can inherit land from the mother.*

All rules of succession and distribution of property, are creatures of civil policy and local legislation merely. Pollly Norris died in the year 1837. At the time of her decease, the statute in force in the State of Illinois, regulating the descent and distribution of real property, approved January 23, 1829, provided, that "Estates, both "real and personal, of resident or non-resident proprietors, in this "State, dying intestate or whose estates, or any part thereof, shall "be deemed and taken as intestate estates, and after all just debts "and claims against such estates shall be paid as aforesaid, shall "descend to and be distributed *to his or her children and their de-*"*scendants in equal parts, &c.*"

That, at *common law*, the word *child*, when used in statutes of this character, was restrained and limited to one who is born within lawful matrimony, is undeniable. But the question here presented is not so much as to the meaning of the word *child* or *children* as whether the English law relative to succession, by illegitimates, is to be recognized as the law of the State of Illinois. That it is not, is obvious from various reasons:

1. The English statutes upon this subject have never been adopted by our local legislation. Dating from the earliest history of Illinois as a State, the distribution and descent of real property have,

from time to time, been made the subjects of State legislation, and which has changed in very many, and essential particulars, the English law upon the same subject.

At the time of the cession of the North-western territory to the general government by the State of Virginia, the statutes of that State directing the course of descents, passed in 1785, and which took effect January 1st, 1787, provided as follows:

"In making title, by descent, it shall be no bar to a party, that "any ancestor, through whom he derives his descent from the intes- "tate is or hath been an alien. *Bastards also shall be capable of* "*inheriting, or of transmitting inheritance on the part of their* "*mother, in like manner as if they had been lawfully begotten of* "*such mother.*"

This positive enactment, directly contraveing the common law, became the law respecting descents, during all the period of the territorial existence of Illinois, and would unquestionably so remain even after it had become a State, in the absence of any State legislation conflicting with it. No change was effected by State legislation, and indeed with reference to the right of bastards to inherit, the subject remained untouched until the year 1845, when the following act was passed and approved:

"If any single or unmarried woman having estate, either real "or personal, in her own right, shall hereafter die, leaving one or "more children, deemed in law illegitimate, such child or children "shall not on that account be disinherited; but they, and each of "them, and their descendants, shall be deemed able and capable in "law, to take and inherit the estate of their deceased mother, in "equal parts among them, to the exclusion of all other persons, "*Provided*, That if there shall be such child or children, or their "descendants, then and in no such case the estate of the intestate "shall be governed by the rules of descent or in other cases where "illegitimates are excluded."

This statute, it will be observed is an almost literal adoption of

the Virginia statute of 1785; and would seem to afford conclusive proof that up to that period it had been regarded as the law of the State of Illinois.

Following this statute, and amendadory thereof, was the act of 1857, already quoted, which affords still further evidence, that the English statutes of descent and distribution have never been adopted by the State of Illinois.

In many other particulars, as an examination of the statutes of descent and distribution, will show, the English rules upon this subject have been subjected to material and radical changes, affording conclusive evidence of the fact, that neither the English law of descends nor the forced and limited construction which English courts gave to those statutes, have been incorporated into or adopted as the law of the State of Illinois.

Even under the common law, as it has received its exposition from English Courts, bastards have, in a large number of cases, been legally recognized as *children* of their mother. Indeed, they are, by English courts, regarded as children for *every purpose except that of succession* (Term Rep. 101, per BULLER J.). They may take as children of their mother under a deirse (*come dig tit bastard E.*). They are punishable for incest (*The Queen* v. *Chafin*).

Thus, it is seen that the right of a bastard to inherit from his mother is not denied even by the English courts, on the ground that such bastard is not a *child* of its mother, but it is a mere arbitrary rule, limited in its application to the single right of succession, and altogether at variance with the whole course of our State legislation.

2. *It cannot be said with reference to laws of distribution and descent of real property, that where statutes are silent upon the subject, the common law would prevail.*

By the civil law, an illegitimate was permitted to inherit the es-

tate of the mother — she being sufficiently certain, though the father was not (Code 6, 57, 5). And it is insisted that the civil law is the source from which the statutes of distribution and descent derive their origin. This is very clearly indicated by the language of the court in *Hays* v. *Thomas*, *supra* it is there said :

"The Court thinks that the civil law mode of ascertaining who "are next of kin ought to be adopted in construing our statutes as "being more agreeable to the nature of things."

If any argument whatever, then, is to be derived from the fact that for a long period of time the statutes of this State were silent as to the right of bastards to inherit, the conclusion would seem to be irresistable, that it was to the civil, and not to the common law, that we were to resort for the construction of our statutes of descent and distribution.

The peculiar circumstances from which the English statutes of descent and distribution derive their origin, and the state of society which gave rise to what may be called the common law upon that subject, afford sufficient reasons why they should not be adopted in this country.

Upon the precise question under consideration we are not without authority.

Thus, in *Heath* v. *White*, 5 Conn. 228, the precise question presented was whether an illegitimate can inherit land from her mother. The statutes under which the case was decided, declared that the property of the intestate should descend "to and among the *children* and such as legally represent them." The court held that as the English statutes had never been adopted in that State, and as the current of legislation, with reference to the descent and distribution of property, had, in many particulars, set against the English rules, the civil law should be adopted; the word *children*, for the purposes of inheriting from the mother, as used in the statutes, should be construed to include illegitimates, and that the bastard was therefore entitled to inherit.

The same doctrine was also expressly recognized and enforced in *Town of Burlington* v. *Fosby*, 6 Ver. 83.

We insist, therefore, that in the absence of the statutes of 1857, and for the reason above stated, the title to the property in controversy, passed to Sophia Norton, and that through her, the defendant in error derived a perfect title.

This, however, leads to the consideration of another point made in the case, by the plaintiff in error

3. As to the Constitutionality of the law of 1857.

In this connection, it is to be observed that, to a certain extent, at least, the Act of 1857 is but an affirmation of the law theretofore existing. By the statute of 1845, as we have already seen, a bastard child could inherit from its mother. This was, by express legislation, the law in the State of Illinois as early as 1845, and before any rights whatever had been vested in Isaac Murphy, the grantor of the plaintiff in error. The Act of 1857, simply affirms the same rule, extending its operations to cases which had occurred before its passage. It declares in effect, simply that the Act of 1845, by which illegitimate children were made capable of inheriting, should extend to all cases, whether the death of the mother occurred before or after the passage of that act.

It is well settled, that the mere fact that a law is retrospective in its operation, does not render it repugnant to the Constitution. Indeed, in several cases, the rule has been much more broadly stated.

Thus, in *Satterlee* v. *Matthewson*, 2 Pet., 380, which was an action of ejectment, the plaintiff, at the trial, set up a title under a warrant dated the 10th of January, 1812, founded upon an improvement in the year 1785, which, it was admitted, was under a Connecticut title, and a patent bearing date the 19th of February, 1813.

The defendant claimed title under a patent issued to Wharton in the year 1781, and a conveyance by him to Satterlee in 1812. It was contended, on the part of the plaintiff, that, admitting the defendant's title to be the oldest and best, yet he was estopped from setting it up in that suit, as it appeared in evidence that he had come into possession as tenant to the plaintiff sometime in the year 1790—judgment was entered for plaintiff. Upon writ of error being taken to the Supreme Court of Pennsylvania, that court decided that the relation of landlord and tenant could not subsist under a Connecticut title, upon which ground the judgment was reversed, and a *venire facias de novo* awarded.

In April, 1826, and before the second trial took place, the legislature of Pennsylvania passed a law in substance as follows:

"That the relation of landlord and tenant shall exist and be held "as fully and effectually between Connecticut statutes and Penn- "sylvania claimants, as between other citizens of this Common- "wealth, on the trial of any cause now pending or hereafter to be "brought within this Commonwealth, any law or usage to the con- "trary notwithstanding."

On the second trial, judgment was entered for the plaintiff.

The only question which arose in the case, in this court, was whether the statutes of Pennsylvania, before referred to, was objectionable on the ground of its repugnancy to the constitution of the United States. After saying that "it cannot be contended that to create a contract and to destroy or impair one mean the same thing," the court, with reference to the statute then under consideration, say:

"It is said to be retrospective. Be it so; but retrospective laws "which do not impair the obligation of contracts or partake of "the character of *ex post facto* laws, are not condemned or forbidden "by any part of that instrument" (the constitution.)

* * * * * * *

"The objection, however, which was most pressed upon the court,

"and relied upon by the counsel for the plaintiff in error, was that "the effect of this act was to divest rights which were vested by "law in Satterlee.

"There is certainly no part of the Constitution of the United "States, which applies to a State law of this description; nor are "we aware of any decision of this, or of any other court, which has "condemned such a law upon this ground, provided its effect be "not to impair the obligation of a contract."

The same principles were re-affirmed in the court in *Watson* v. *Mercer*, 8 Pet., 110. "As to to the first point, (say the court), it is "clear that this court has no right to pronounce an Act of the State "Legislature void, as contrary to the Constitution of the United "States, from the mere fact that it divests antecedent vested rights "of property."

Both these cases are cited and approved in *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 539, and, in hat case, the court say:

"It is well settled by the decisions of this court, that a State law "may be retrospective in its character, and may divest vested "rights, and yet may not violate the Constitution of the United "States, unless it, also, impairs the obligation of a contract."

At the time of the passage of the act of 1845, by which it was declared, "that if any single or unmarried woman having estate, "either real or personal, in her own right, shall hereafter die, leav- "ing one or more children deemed by law illegitimate, such child "or children shall not, on that account, be disinherited, but they "and each of them and their descendants shall be deemed able and "capable in law to take and inherit the estate of their deceased "mother in equal parts among them," &c. No rights whatever had become vested in the grantor of the plaintiff in error. The true construction of the act of 1845, must be, that it was intended to render bastards capable of inheriting from their mother, and this whether the mother died before or after the passage of the act.

The words, "shall hereafter die," as used in the act, were evidently intended merely for the purpose of protecting rights which might theretofore become fixed or vested in other persons under the operation of a different rule. But where no such rights had become vested, the act must be construed in its broadest sense, and effect given to every part of it, to-wit: that an illegitimate child shall not on that account be disinherited.

The law declares the status of the person. By its express language bastards are declared capable of inheriting, and in case where the mother had died before the passage of that act, and in the meantime no other interests had intervened or rights become vested, her illegitimate children could assert the rights which the statute had conferred upon them, and take by inheritance.

The title of the defendant in error arises from payment of taxes and occupancy of the property in controversy for seven successive years. Before any rights become vested and fixed under the statute, the seven years must have elapsed. That is the contract between the State and the individual, created by that statute, and hence it clearly follows, that until that period of time has elapsed, no rights have become vested, and no contract complete. The first payment of taxes was made in the year 1843, and the rights of the occupant did not mature until the year 1850; and consequently, the act of 1845, declaring illegitimates capable of inheriting, so far as it related to this case, devested no rights to the property in controversy, none having become vested, and impaired the obligation of no contract, because no contract existed. The act of 1857, simply enlarged the right given by the act of 1845, and extended its operation. Instead of impairing the obligation of a contract, it asserted, enforced and *confirmed* the contract, which, by the act of 1845, the State of Illinois entered into with illegitimate children. Instead of devesting, it secured vested rights.

The right of a legislature, by retrospective laws, to correct and confirm contracts — to render those obligations or rights operative and complete, which before, by reason of some informalities, were inoperative and liable to be defeated, has long been established and is illustrated in a large number of cases.

Thus, in *DePeyster* v. *Michael*, 2 Seld. 503, the act of 22d October, 1779, transferring the seignory and escheat from the crown of Great Britain to the people of the State and the statute of tenures (1787) abolishing military tenures, and converting all manoral and other terms into free and common socage took effect retrospectively and operated on the lands and tenures held under colonial grants from July, 1776.

And again, in the same State, in *Wilson* v. *Baptist Educational Society*, 10 Barbour, 308, it was held that retrospective statutes are valid which give remedies, where none existed before, for defects that would have been fatal had the legislature not interfered, and given a perfect remedy by curing intervening irregularities.

This docrine was applied in *Syracuse City Bank* v. *Davis*, 16 Barb., 188, to an action by a bank, incorporated under the general banking law, where it appeared that the certificate of incorporation was defectively proved and acknowledged; that the defect was not remedied until several years afterwards, by an act declaring that the bank should be deemed to be a valid corporation, and to have been duly organized, notwithstanding the original error in the certificate, and that the note in suit, was made before the passage of the act.

The court held the Act of 1852, although retrospective in its operation, to be valid.

In *Underwood* v. *Lilly*, 10 Serg. & Rawle, 97, 101, a judgment entered on the *first*, instead of the *third* of January, and void for that reason, was held to be cured by an Act of 1822, declaring those judgments, entered before the passage of the act, *valid*.

Again in *Tate* v. *Stooltzfoos*, 16 Serg. & Rawle, 35, it was decided that an omission in the certificate of acknowledgment of a married woman to a deed, conveying her estate in lands, was remedied by an act, passed for that purpose, after the death of the wife, and after the lands had descended, and after the court had decided that the acknowledgment was inoperative to pass the lands. In the face

of these facts, the court held that the act in question, being remedial in its nature, cured the defective acknowledgment, so that the lands passed, and the grantee took the title under it; although, without the act, no title would have passed by deed to the grantee.

Again, in *Hepburn* v. *Curts*, 7 Watts, 360, the court laid down the doctrine, that it is competent for the legislature to pass acts retrospective in their character, notwithstanding their operation may be to affect pending suits, and to give to a party rights he did not before possess; or to modify an existing remedy; or to remove an existing impediment in the way of a recovery, by legal proceedings.

The subject of the retroactive effect of statutes, with reference to vested rights, was fully discussed in *Baugher* v. *Nelson*, 9 Gill., 299. Suit was brought in 1846 on a single bill, executed by the defendant in 1846. The defendant pleaced that the note was usurious, and void under an Act of 1704. The plaintiff replied — a statute, passed on the tenth of March, 1846, declaring substantially that in any suit or action thereafter to be brought, in any court of law or equity, upon any contract, the plaintiff should be at liberty to recover the principal and legal interest. It was insisted by the defendant, that the act was unconstitutional so far as it referred to contracts existing before its passage; but the court held the act valid and constitutional.

In *Goshen* v. *Stonington*, 4 Conn., 410, the same principle was affirmed by the Supreme Court of Errors of the State of Connecticut. That was an action of assumpsit, to recover the sum of $380, expended by the plaintiffs, at the request of the defendants, for the support of Betsey Cooke, the wife of Joseph Cooke, and their five children, from the 8th of October, 1818, to the 9th of September, 1820, alledged to be paupers, having their legal settlement in the town of Stonington, and residing in the town of Goshen at the time the support was furnished.

Joseph Cooke was born and had his legal place of settlement in the town of Stonington; and no evidence was offered to show that

he had ever acquired a settlement in any other place. Whether Betsey Cooke and her children, were legally settled in the town of Stonington, depended upon the validity of her marriage with Joseph Cooke.

The marriage not being solemnized by a person authorized by the then existing laws of the State, to celebrate marriages, was originally void. In May, 1820, the legislature of the State of Connecticut passed an act declaring such marriages good and valid to all intents and purposes. And the question in the case was, whether that act could constitutionally have a retrolative effect so as to legalize the marriage between Joseph and Betsy Cooke, and thus fasten liability upon the town of Stonington for support furnished before the passage of the act, and for which, without that act, they would not have been liable.

The court held the act to be constitutional and valid — Ch. J. Hosmer holding this language:

"I believe no person will deny that the exercise of legislative "authority merely and without further consequences to confirm "marriages not duly celebrated, is valid, *although clearly retrospec-* "*tive and manifestly operating on the rights of individuals.* And "as every law intrinsically implies an opinion of the legislature "that they had authortty to pass it, and that it is just and reason- "able on all occasions that may arise, it is proper to demand that "the supposed unjust violation of legal right by statute should be "established with great clearness and certainty."

The same principle was again applied in *Mather* v. *Chapman*, 6 Conn., 54, in an action of ejectment, where the plaintiff claimed title to the premises by virtue of levy of an execution in his favor, against one of the defendants, in December, 1823.

It was conceded that, by the laws in existence at the time the levy was made, the return of the officer was fatally defective, and the plaintiff acquired no title by the levy. An act of the legislature

of the State of Connecticut, approved June 1st, 1825, confirming levies of executions in certain cases, and embracing the case there under consideration, was relied upon by the plaintiff, but it was objected by the defendant, that the act was unconstitutional and void, because its effect was to impair the obligation of contracts to take away and destroy vested rights.

The court held the act constitutional and valid.

The same principle was still more distinctly recognized and enforced in *Beach* v. *Walker*, 6 Conn., 190. That was an action of ejectment, in which the plaintiff claimed title to the demanded premises, by virtue of the levy of an execution, in their favor, against the defendant; and it was admitted that the plaintiff's title depended upon the validity of that levy.

The levy was held void, for the reason that the officer embraced in his return, fees not allowable by law.

After the levy had been made, the legislature of the State of Connecticut passed an act, declaring all such levies valid and effectual to transmit the title to the real estate levied upon.

It was objected that this act was unconstitutional, but the Supreme Court held otherwise and asserted its validity.

The same doctrine was also enforced in *Booth* v. *Booth*, 7 Conn. 365, and in *Norton* v. *Pettibone* 7 Conn. 316.

Numerous other cases might be cited upon this point, but I apprehend that the authorities already referred to are decisive upon the point that a statute retrospective in its operations, which does not impair the obligation of a contract, is valid and constitutional.

There is, as I have already insisted, no contract impaired by the act of 1857, so far as the present case is concerned. The act under which the plaintiff in error makes claim of title, provides that every person in the actual possession of lands, or tenements, under claim

and color of title made in good faith, and who shall, for seven successive years, continue in such possession, and shall, also, during said time, pay all taxes legally assessed on such lands and tenements, shall be held and adjudged to be the legal owner of said lands and tenements, to the extent, and according to the purport of his or her paper title.

The right conferred by this statute, does not become vested and fixed, until after the lapse of seven years.

By the act of 1845, which has already been quoted, declaring that bastards might inherit from the mother. Sophia Norton became, upon the decease of her mother, the owner of the land in controversy. This, I conceive, would have been so, even without the statute of 1845, under the Virginia act of 1785, and the decision of the Supreme Court of Illinois already cited.

Sophia Norton, then, being the owner of the land in suit under the act of 1845, so far as the statute of 1857 is concerned, it is only important to consider whether its effect is to devest the plaintiff in error of any rights acquired under the act, through the operation of which he claims to have derived his title. As we have already seen, at the time of the passage of the act of 1845, the taxes had been paid but two years, and no rights had vested. The title, then, remained in Sophia Norton, was *vested* in her — and the act of 1857 is *simply a confirmation of a right which already existed in her*, and not a denial of, or devesting a right existing in the plaintiff in error. Next in order of time, is the act of 1853, of which the Act of 1857 is amendatory. That act fixes the rules of descent of property, real or personal of bastards dying intestate, as follows:

1. To the widow, or surviving husband and children, as the property and effects of other persons, in like cases.

2. Where there are no children, or descendant of a child or children, then to the widow or surviving husband.

3. Where there is no widow, surviving husband, or descendants,

then to the mother and her children, and their descendants—to the mother one-half, and the other half to be divided equally between her children, and their descendants; the descendants of a child taking the share of their deceased parent or ancestor.

4. Where there were no heirs, then to the next of kin to the mother of such illegitimate person, in the same manner as the estate of a legitimate person would, by the laws then in force, pass to the next of kin.

Now the entire scope and character of the act of 1857 is *confirmatory*. It changes in no respect the rights existing, either under the statutes of 1845 and 1853, but simply *construes* those statutes by making them relate to those cases where the death of the party had occurred prior to the passage of those acts. In other words, the title derived by an illegitimate child by inheritance from its mother, was confirmed and placed beyond doubt, in all those cases where the mother had died before the passage of the act. It *confirms* a right instead of *devesting* it. Carries out and enforces the contract which it was the evident intention of the legislature to make with illegitimates by the act of 1845, instead of impairing the obligation of a contract, by virtue of the statute, through which the plaintiff in error claims title. Under the latter statute no obligation was created, until after the lapse of seven years, and long before that time had been reached, Sophia Norton was the owner of the property.

Ther is one other consideration which remains to be noticed with reference to the act, under which the plaintiff in error claims. It is in that act especially provived, that it shall "not extend to lands "or tenements owned by the United States, or this State, nor to "School and Seminary lands, nor to lands held for the use of religi-"ous societies, nor to lands held for any public purpose. Nor shall "they extend to lands, or tenements, when there shall be an ad-"verse title to such lands, or tenements, and the holder of such ad-"verse title is under the age of twenty-one years, insane, imprison-"ed, *feme covert*," &c. "Provided such person shall commence an

"action to recover such lands, or tenements, so possessed, as afore-
"said, within three years after the several disabilities herein enu-
"merated shall cease to exist," &c.

Sophia Norton, through whom the defendant in error derives title, was a married woman from the year 1816 to 1853, (see Rec. *p.* 8), and in the year 1855 this action was brought.

The title held by Sophia Norton was adverse, and hence, under the operation of the statute, *no rights whatever vested in the plaintiff in error, under that statute, she being a feme covert.* We, therefore, insist that the statute of 1857 must be considered as decisive of the case.

WM. KELLOGG,

COUNSEL FOR DEFNDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. ~~246~~. 162.

THE BANK OF THE STATE OF SOUTH CAROLINA,
APPELLANTS,

vs.

THE COMMERCIAL MUTUAL INSURANCE CO., EDWARD J. BICKNELL AND DARIUS S. SKINNER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

CCXLVI. GIDEON, Printer, 511 Ninth Street, D.C.

SUPREME COURT OF THE UNITED STATES.

No. 246.

THE BANK OF THE STATE OF SOUTH CAROLINA,
APPELLANTS,

vs.

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At a Circuit Court of the United States for the first Circuit, begun and holden at Newport within and for the Rhode Island district on the fifteenth day of June, A. D. 1860.

Present,

Hon. NATHAN CLIFFORD, *Associate Justice Sup. Ct.*

Hon. JOHN PITMAN, *District Judge R. I. District.*

GEORGE H. BROWNE, ESQ., *District Attorney.*

FRANCIS C. GARDINER, *U. S. Marshal.*

HENRY PITMAN, *Clerk.*

The following cause in Equity, amongst others, was disposed of:

THE BANK OF THE STATE OF SOUTH CAROLINA
vs.
THE COMMERCIAL MUTUAL INSURANCE CO., *et al.*

Be it remembered, that on the nineteenth day of October, A. D. 1857, the following bill in equity was filed in the clerk's office of the Circuit Court for the District of Rhode Island.

RHODE ISLAND DISTRICT, *ss.*

To the Honorable the Judges of the Circuit Court of the United States for the District of Rhode Island.

The Bank of the State of South Carolina
vs.
The Commercial Mutual Insurance Company and Bicknell & Skinner. } In Equity.

The Bank of the State of South Carolina, a corporation created by the Legislature of the State of South Carolina, located and transacting business in the city of Charleston, in said State, a citizen of said State of South Carolina, brings this, its bill of complaint, againt the Commercial Mutual Insurance Company, a corporation created by the Legislature of the State of Rhode Island, located and transacting business in the city of Providence, in said State, a citizen of said State of Rhode Island, and against Edward J. Bicknell and Darius S. Skinner, both of the city and county of Providence, in said State of Rhode Island, and both citizens of the State of Rhode Island, co-partners, transacting business under the firm of Bicknell & Skinner.

And thereupon the said complainant corporation complains and says, that heretofore, to wit, at said Charleston, in said State of South Carolina, and on or about the twenty-first day of August, eighteen hundred and fifty-seven, one Michael Lazarus, of said Charleston, a citizen of said State of South Carolina, was

the owner of forty-two bales of cotton, which he then and there shipped on board the Tern called the Emily Ward, then lying at said port of Charleston, and bound to the port of New York, which said cotton was to be forwarded from New York to said Bicknell & Skinner, the defendants aforesaid, and for which the said Lazarus received from the agent of the said Tern Emily Ward, the bill of lading, a copy of which is hereto annexed, marked A., and made a part of this bill; and at the same time the said Michael Lazarus made and drew his bill of exchange, payable to his own order, upon the said Bicknell & Skinner, dated the twenty-first day of August, eighteen hundred and fifty-seven, payable sixty days after sight, for the sum of twenty-four hundred dollars, on account of the proceeds of the sale of said cotton, which was to be sold by the said Bicknell & Skinner; and the said Michael Lazarus thereafterwards, to wit, on the same day, for value received of the said complainant corporation, endorsed and delivered said bill of lading, and also said bill of exchange (a copy of which is hereunto annexed, marked B., and made a part of this bill) to the said complainant corporation; and thereupon the said forty-two bales of cotton and the said bill of exchange drawn against the same, became and were the property of said complainant corporation.

And the said complainant corporation further states, that the said bill of exchange was duly forwarded for acceptance to the said Bicknell & Skinner, and accepted by them, to wit, on the twenty-fifth day of August, eighteen hundred and fifty-seven, and is now held by said complainant corporation.

And further, that the said Bicknell & Skinner, immediately upon their acceptance of the said bill of exchange, caused the said forty-two bales of cotton to be insured by the said Commercial Mutual Insurance Company, defendants as aforesaid, by a policy of insurance and memorandum thereto annexed, a copy of which is hereunto annexed, marked C., and made a part of this bill.

And the said complainant corporation further states, that the said Tern, Emily Ward, on or about the day of August, eighteen hundred and fifty-seven, with the said forty-two bales of cotton on board, sailed from said port of Charleston bound to said port of New York, and that afterwards and during the said voyage, the said Tern was wrecked by the perils of the seas, and became and was, together with the said forty-two bales of cotton so shipped and insured as aforesaid, totally lost.

And the said complainant corporation further states, that afterwards, to wit, at said Providence, on or about the day of September, eighteen hundred and fifty-seven, and before the maturity of said bill of exchange, said Bicknell & Skinner failed, and became and were, and still are, insolvent, and neglect and refuse to pay their debts as they became due; and, as the said

complainant corporation are informed, are unable to pay and satisfy their just debts, including the said bill of exchange as aforesaid.

And the said complainant corporation further states, that said Bicknell & Skinner, notwithstanding their said insolvency, have applied to said insurance company for the payment of said insurance money to them, and have endeavored to collect the same although they have been notified of the interest of said complainant corporation therein, and with the intent, as the said complainant corporation is informed and believes, of procuring said insurance money, and of refusing to pay said bill of exchange so accepted by them as aforesaid, thereby depriving the said complainant corporation of all benefit and advantage of said insurance, growing out of their interest in said forty-two bales of cotton as aforesaid.

And the said complainant corporation avers, that, by reason of the said insolvency of said Bicknell & Skinner, as aforesaid, it is entitled to collect and receive the said insurance money as aforesaid, in the same manner as it would have been entitled to have stopped said cotton and taking the same into possession in its transit from said port of Charleston to its actual possession by said Bicknell & Skinner, and in the same manner as they would have the right to recover possession of said cotton from said Bicknell & Skinner, upon returning to them their acceptance and paying the charges and expenses thereon; and that the said insurance inures to the benefit of said complainant corporation.

And the said complainant corporation further states, that it has tendered to said Bicknell & Skinner the said bill of exchange accepted by them as aforesaid, and demanded of them a transfer of said policy, or an order for said insurance company to pay said insurance money to said complainant corporation, in consideration of the release of said Bicknell & Skinner from their acceptance of said bill of exchange, and of the payment of the premium ofs aid insurance, and other charges and expenses of said Bicknell & Skinner in relation to the same.

And the complainant corporation further states, that it has notified the said Commercial Mutual Insurance Company of its claim for said insurance money, and has offered to transfer to said insurance company said bill of exchange, and has also offered to make proof of said loss of said forty-two bales of cotton, and demanded payment of said insurance money thereon.

And the said complainant corporation herewith brings into this Court the said bill of exchange, and offers to pay the charges and expenses of said Bicknell & Skinner, incurred in the consignment of said forty-two bales of cotton as aforesaid, and also the premium paid, or agreed to be paid, for said insurance.

And the said complainant corporation had well hoped that the said Commercial Mutual Insurance Company would have paid

over said insurance money to the said complainant corporation, and that the said Bicknell & Skinner would have delivered to said complainant corporation an order upon said Commercial Mutual Insurance Company, for the payment of said insurance money as aforesaid, their charges and expenses and the said bill of exchange being paid out of the same.

But now so it is, may it please your Honors, that the said Commercial Mutual Insurance Company and the said Bicknell & Skinner, combining and confederating with each other, and with other persons to the said complainant corporation unknown, have refused to acknowledge the right of the said complainant corporation in the premises and their title to said insurance money, and that the said Commercial Mutual Insurance Company intends to pay the same, and the said Bicknell & Skinner are about to receive the same, in fraud of the rights of the said complainant corporation in the premises.

To the end, therefore, that the said Commercial Mutual Insurance Company and the said Bicknell & Skinner, and the rest of the confederation, when discovered, may, upon their respective and several oaths, full, true, direct and perfect answers make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated; and that not only as to the best of their several and respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief; and that the said Commercial Mutual Insurance Company may be enjoined from paying said insurance money, except to said complainant corporation; and that the said complainant corporation may be allowed to make proof of the loss of this cotton, insured as aforesaid, and be declared entitled to recover the insurance money from the said Commercial Mutual Insurance Company, in the same manner as if the said complainant corporation had effected said insurance on said cotton; and that said Commercial Mutual Insurance Company be ordered to pay the same to said complainant corporation; and that the said Bicknell & Skinner may be enjoined from commencing any proceedings for collection of said insurance money, except at the request of and for the benefit of said complainant corporation; and for such other and further relief in the premises as to your Honors may seem meet and the nature of the case may require.

May it please your Honors to grant unto said complainant corporation, not only a writ of injunction, commanding the said Commercial Mutual Insurance Company to refrain from paying said insurance money to said Bicknell & Skinner, and said Bicknell & Skinner to desist and refrain from collecting the same, but also a writ of subpœna, issuing out of the clerk's office of this court, and under the seal thereof, commanding the said defend-

ants, under a certain penalty therein mentioned, to be and appear at the said clerk's office of this court, on the next Rule Day thereof, then and there to answer the premises, and to stand to, abide and perform such orders and decrees as may be entered in this court.

THE BANK OF THE STATE OF SOUTH CAROLINA,
By their Solicitor,
T. A. JENCKES.

Exhibit A.

O O 34 bales
V 5
P 2
A 1
—
42 bales cot'n, wg. 18,561, or 442 per bale.

SHIPPED, in good order and well conditioned, by Michael Lazarus, on board the good Tern called the Emily Ward, whereof Bradley is Master for the present voyage, now lying in the port of Charleston, and bound for New York, to say, forty-two bales of cotton under deck, to be forwarded by Geo. R. Sheldon, Esq., New York, to Messrs. Bicknell & Skinner, Providence, R. I., being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned, at the aforesaid port of New York (the danger of the seas only excepted), unto the order of the shipper, or to his assigns, he or they paying freight for the said cotton, twenty cents per 100 lbs., with primage and average accustomed. In witness whereof, the Master or Agent of the said vessel hath affirmed to three Bills of Lading, all of this tenor and date; one of which, being accomplished, the others to stand void.

Dated in Charleston, the 21st day of August, 1857.

T. J. KERR, *Agent.*

(Endorsed.) MICHAEL LAZARUS.

Exhibit B.

Exchange for $2,400.

CHARLESTON, S. C. } 21st Aug. 1857. }

Sixty days after sight of this first of exchange (second unpaid), pay to the order of myself, twenty-four hundred dollars, value received, and charge the same to account shipment per Emily.

Respectfully yours,
MICHAEL LAZARUS.

To Messrs. BICKNELL & SKINNER, Providence, R. I.

(Endorsed.) MICHAEL LAZARUS.

Providence, August 25, 1857. Accepted.

BICKNELL & SKINNER.

Exhibit C.

Copy.

No. 929.

COMMERCIAL MUTUAL INSURANCE COMPANY, PROVIDENCE, R. I.

This Policy of Insurance Witnesseth, That the Commercial Mutual Insurance Company, in consideration of the respective premiums, set forth in the several endorsements hereinafter following, to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure Bicknell & Skinner on all merchandise shipped by or to them, *at* and *from* port or ports, *to* port or ports of destination, on the Atlantic Ocean, and upon the waters connected therewith, including the North Sea, to continue the same until notice is given by either party, in writing, to cancel this policy; the said B. & S. to give notice of all shipments on receipt of information, each ten bales of cotton in successive numbers subject to their own average. Rates of premium as per memo. on file, of this date,—against loss or damage on the high seas and elsewhere, as mentioned in said respective endorsements hereon made by the President or Secretary of this Company, and to the amounts, and in the manner therein set forth.

Beginning the adventures, respectively, upon the property insured, from and immediately following the lading thereof, and continuing the same, till said property shall be safely landed, in terms of the endorsements aforesaid. And it shall and may be lawful for the vessels employed, to load in such manner as is usual and customary for vessels employed in the same navigation, and to proceed and sail to, touch and stay at, any intermediate port or ports, place or places, if thereunto obliged by stress of weather, head tide, or any unavoidable accident, without prejudice to this policy.

And the said Commercial Mutual Insurance Company agree to bear and take upon themselves, in the voyages described in said endorsements, the danger of the seas, of fire, enemies, pirates, overpowering thieves, restraints and detainments of all kings, princes or people, of what nature or quality soever; barratry of the master [unless the insured be owner of the vessel] and of the mariners; and all other losses or misfortunes that have or shall come to the damage of said property, or any part thereof, to which insurers are liable; *Provided*, that said Company shall not be liable for any partial loss on bar or sheet iron, iron wire, hoop iron, tin plates, ice, salt, grain of all kinds Indian meal, tobacco, not manufactured, peas, beans, hay-seed, fruits (whether preserved or otherwise), hams, cheese, dry fish, vegetables and roots, molasses, hempen yarn, cotton bagging, pleasure carriages, house-

hold furniture, skins or hides, musical instruments, or looking glasses, or any articles that are perishable in their own nature; nor for any partial loss on hemp or flax, unless the same shall amount to twenty per cent. on the whole aggregate value thereof; nor for any partial loss on cutlery, hardware, flour, butter, lard, sugar, rice, manufactured tobacco, flax-seed, bread, coffee, pepper; or on vessels valued at less than ten thousand dollars, unless the same shall amount to ten per cent. on the whole aggregate value of such articles, or the agreed value of such vessel; nor for any partial loss on any other articles, or vessels or freights, unless it amounts to five per cent. on the aggregate or agreed value thereof; exclusive in each case of the charges or expenses incurred for the purpose of ascertaining and proving the loss; but the insured shall recover on a general average.

And in case of any loss or misfortune, it shall be lawful for the insured, their factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of said property, or any part thereof, without prejudice to this insurance; to the charges whereof the Commercial Mutual Insurance Company will contribute, according to the sum herein insured, nor shall the acts of said Company or the insured in recovering, saving, securing or preserving the property insured, in case of disaster, be considered or held a waiver, or an acceptance of abandonment.

In case of loss under the policy, the same shall be paid in ninety days after proof and adjustment thereof (the premium note, if unpaid, and all other moneys due or owing to the Company, from the insured, being first deducted, the Company allowing the discount of interest on such sums other than the premium note given for this insurance, as are not at maturity.

And it is hereby agreed, that if the insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then the said Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully recovering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another; and the said Insurance Company shall return the premium, or a rateable part thereof, upon so much of the sum by them insured, or for such part of the voyage as they shall be exonerated from by such prior insurance, provided, that no return premium shall be made for any passage, whereon the risk has once commenced. And in case of any insurance upon said property, whether it be for the whole or part of the voyage, subsequent in date to this policy, the said Insurance Company shall, nevertheless, be answerable, to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such

subsequent insurance had been made; and in case of return premium, half per cent. upon the sum for which each return premium is allowed or claimed, may be retained. It is also agreed, that in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or other arrest,) for at least ninety days; and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised.

It is also agreed, that the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure or detention, for, or on account of illicit or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign consular, or colonial court, shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. It is also agreed, that this policy shall be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the insurers. It is also agreed, that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured; and in case of a total loss of the vessel with salvage, the amount allowed out of the salvage to the officers and crew for the wages earned, or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. It is further agreed, that if any dispute shall arise, relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators mutually chosen, whose award in writing shall be conclusive and binding on all parties; and that the said Company are not liable for wages or provisions except in general average.

This policy is not to attach when the owner of the vessel is the insured, unless provisions and water are secured in the hold of the vessel, agreeably to the law of the United States. If there be any lime on board, fifty per cent. to be added to the premium for the passage.

In the adjustment of claims for repairs on the vessel, whether in the nature of a partial loss, or of a general average, there shall first be a deduction of one-third, new for old, from the cost of labor and materials required in making the repairs; and from

the balance shall be deducted the proceeds, or value of the old materials which shall have been saved and replaced with new.

It is specially agreed, that instead of deducting one-third for new on the article of copper sheathing, there shall be deducted two and a-half per cent. of the net cost of re-coppering, after deducting the value of the old copper and nails, for each and every month the copper shall have been on the vessel when the accident occurred; and if the copper shall have been on forty months or more, the cost of re-coppering shall be wholly borne by the insured.

And the said Insurance Company do hereby bind only the capital stock and other common property of the said Company, to be insured, their executors, administrators, and assigns, for the true performance of the premises.

In witness whereof, the President of the said Commercial Mutual Insurance Company hath hereunto subscribed his name, and caused the same to be countersigned by their Secretary, at their office in Providence, this ninth day of January, one thousand eight hundred and fifty-seven.

(Signed,) GEO. C. ARNOLD,
President.

(Signed,) J. A. BUDLONG,
Secretary.

Bicknell & Skinner's Proposal for Entry.

42 bales cotton, on board the Tern "Emily Ward," at and from Charleston to New York, and while there, and from thence to this port as customary. Value at thirty-five hundred dollars, ($3500).

$3500 a ½ per cent,,	$17 50	
Of 1½ per cent.,	25	
		$17 25

Providence, Aug. 25, 1857.

(Signed,) BICKNELL & SKINNER.

Under this policy we entered, Aug. 25, 1857, insurance for $3500 on 42 bales cotton, on board the Tern, "Emily Ward," at and from Charleston to Providence, via N. York, as customary, ½ per cent. less 1½ per cent. $17 25

J. A. BUDLONG,
Secretary.

Subpœna.

Rhode Island District, } *ss.*

The President of the United States of America, to the Commercial Mutual Insurance Company, a corporation created by the Legislature of the State of Rhode Island, located and transacting business in the city of Providence, in said State, a citizen of Rhode Island, Edward J. Bicknell and Darius S. Skinner, both of the city and county of Providence, in said State of Rhode Island, and both citizens of said State of Rhode Island, copartners, transacting business under the firm of Bicknell & Skinner, Greeting:

For certain causes offered to our Circuit Court for the first circuit within and for the Rhode Island District. In Chancery. We hereby command and strictly enjoin you and each of you, that, laying aside all others, matters and things, and notwithstanding any other excuse, you and each of you personally appear at the clerk's office of said Court, in Providence, on Monday, the seventh day of December next, being a rule day of said Court, and then and there full, true and perfect answer make, upon your several corporal oaths, to the Bill of Complaint of the Bank of the State of South Carolina, a corporation created by the Legislature of the State of South Carolina, located and transacting business in the city of Charleston, in said State, a citizen of said State of South Carolina, now filed of record in the clerk's office of said Court, and to do and receive whatever our said Court shall order against you in the premises in this behalf; and hereof fail not, under the pains and penalties that may accrue in consequence of neglect thereof.

And the Marshal of said Rhode Island District, or his deputy, is hereby commanded to make service of this writ, by reading the same to the said Commercial Mutual Insurance Company, and the said Bicknell & Skinner, or by leaving a true and attested copy hereof, at their several last and usual places of abode, twenty days before the rule day aforesaid.

Witness the Hon. Roger B. Taney, our Chief Justice, at Providence, this nineteenth day of October, A. D, 1857.

HENRY PITMAN,
Clerk.

Memo.—The appearance of the respondents in the suit is to be entered in the clerk's office, on or before the return day of this writ, otherwise the bill may be taken *pro confesso* as against those not appearing.

Rhode Island District, *sc.* }
October 19th, 1857. }

I have this day served the Secretary of the Commercial Mu-

tual Insurance Company, and Bicknell & Skinner, with true and attested copies of the within subpœna, as commanded.

R. CLAPP,
Deputy U. S. Marshal.

Fees—3 services, $6 00
3 copies, 1 50
—— $7 50

Appearance of Respondents.

Francis E. Hoppin hereby enters his appearance for the defendants, Bicknell & Skinner, two of the defendants in said case.

Answer of Defendants.

Circuit Court of the United States, Rhode Island District, *sc.* } In Equity.

The joint and several answers of Edward J. Bicknell and Darius S. Skinner, two of the defendants to the Bill of Complaint of the Bank of the State of South Carolina, complainant:

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto, severally say:

That they have been informed, and believe it to be true, that heretofore, to wit, at Charleston, in the State of South Carolina, on or about the 21st day of August, A. D. 1857, one Michael Lazarus, of said Charleston, was the owner of forty-two bales of cotton, which he then and there shipped on board the Tern called the Emily Ward, to be forwarded to these defendants; that the said Lazarus then and there received from the agent of said Tern, the bill of lading, a copy whereof, marked A, is annexed to said bill; that at the same time the said Lazarus made his bill of exchange, payable to his own order, upon said defendants, dated August 21, 1857, for the sum of twenty-four hundred dollars, payable sixty days after sight, on account of the proceeds of the sale of said cotton, to be sold by these defendants; and they are not informed, save by complainant's said bill, that the said Lazarus afterwards, to wit, on the same day, for value received of the said complainant, endorsed and delivered said bill of lading and said bill of exchange to said complainant, (a copy of said bill of exchange being marked B, and annexed to said bill,) and that thereupon said cotton and said bill of exchange became the property of said complainant, and leave the complainants to make proof thereof; and they are not informed, save by complainant's said bill, that said bill of exchange was duly forwarded, and by these defendants accepted, on the 25th day of August, A. D. 1857, and that said bill of exchange, at the filing

of said bill, was held by the complainant, and leave the complain ants to make proof thereof.

And these defendants, further answering, say, that on said 25th day of August, after their acceptance of said bill of exchange, they caused their interest in said forty-two bales of cotton to be insured by said "Commercial Mutual Insurance Company," defendants in said bill, by a policy of insurance and memorandum, a copy whereof, marked C, is annexed to said bill.

And these defendants, further answering, admit that said Tern Emily Ward, with said forty-two bales of cotton, on or about the day of August, A. D. 1857, sailed from said Charleston to said New York, and that afterwards and during said voyage, the said Tern was wrecked by perils of the sea, and became and was, together with said bales of cotton, totally lost.

And these defendants, further answering, admit, that on the day of September, A. D. 1857, and before the maturity of said bill, these defendants failed and became insolvent, and still are insolvent, and are unable, and therefore do not pay their debts as they become due, and are unable to pay their debts in full, including said bill of exchange.

And these defendants, further answering, admit, that they have applied to said Insurance Company for the payment of said insurance money to them, and have endeavored to collect the same, although informed of the said complainant's pretended interest therein, and with the intent of procuring said insurance money.

But these defendants deny that they intend to refuse to pay said bill of exchange so accepted by them as aforesaid, unless they shall be deprived of their assets, (and among other assets of the insurance money upon said bales of cotton,) and by the failure of persons indebted to them, but admit that they do not intend to apply said insurance money specially to the payment of said bill.

And these defendants, further answering, admit, that said complainants have tendered (and before the filing of said bill) to these defendants' said bill of exchange, and at the same time demanded of them a transfer of said policy, or an order for said Insurance Company to pay said insurance money to said complainant, in consideration of the release of said defendants from their said acceptance, and of the payment of the premium of said insurance, and other charges and expenses of said defendants in relation to the same.

And these defendants have been informed and believe, that said Insurance Company have been notified of their said claim by said complaints, and that said complaints have offered to transfer to said Company said bill of exchange, and have offered to make proof of said loss of said forty-two bales of cotton, and demanded payment of said insurance money thereon.

And these defendants, further answering, say, that said contract of insurance upon said cotton was entered into solely between themselves and said Commercial Mutual Insurance Company, without any instruction, express or implied, from these complaints; that the premium therefor is a charge against them, and must be taken out of their assets; that said insurance was effected by them upon their interest in said cotton, growing out of their acceptance of said bill of exchange, drawn as aforesaid by the said Michael Lazarus, for the sum of twenty-four hundred dollars, upon the cotton shipped as aforesaid to these defendants, and that said complaints have no interest in the proceeds of said insurance, either at law or in equity; that the right of "stoppage in transitu" can be only exercised where the property itself can be seized, and that upon its destruction, as upon its delivery to the possession of the vendee, the right, which is purely equitable, is forever lost; that said complainants have no more right to the insurance money upon this cotton, than upon the insurance money for any other cotton, or upon any other property of these defendants, unless the same is attached by the ordinary process of law; that these complaints might have insured their own interest, as said Lazarus has frequently done in like cases, (if any) in said bales of cotton; and having omitted to do that, cannot take into their own hands the proceeds of this insurance, made by other parties to protect their own interests; that if they have omitted to insure their own interest, they must suffer the consequences of their own neglect; that said insurance cannot enure to the benefit of said complainant corporation, not having been made by these defendants by the request of said complainants, either express or implied, and that said insurance money belongs to these defendants, for their own use and benefit.

And these, defendants, further answering, deny all and all manner of unlawful combinations and confederacy, wherewith they are by said bill charged, without this, that there is any other matter, cause or thing in the said complainants' bill of complaint, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided and denied, is true, to the knowledge and belief of these defendants.

All which matters and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct; and humbly pray to be herein dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

EDWARD J. BICKNALL,
DARIUS S. SKINNER.

R. I. District, *sc.*

On this second day of January, A. D. 1858, personally came

the above named Edward J. Bicknell and Darius S. Skinner, and made oath that the statements contained in the foregoing answer, so far as stated of their own knowledge, are true, and so far as stated upon their information and belief, are true, according to their best information and belief.

Before me, JOSEPH S. PITMAN,
U. S. Commissioner of the Circuit Court for said District.

Replication to defendants' answer.

The replication of the Bank of the State of South Carolina, complainant, to the joint and several answer of Edward J. Bicknell and Darius S. Skinner, two of the defendants:

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto, saith, that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant: without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true. All which matters and things this repliant is, and will be ready to aver and prove, as this Honorable Court shall direct; and humbly, prays as in and by its said bill it hath already prayed. By its Solicitor,

T. A. JENCKES.

Commission.

United States of America, }
Rhode Island District, *sc.* }

The Circuit Court of the United States, within and for the [L. S.] Rhode Island District, to Samuel W. Peckham, of the city and county of Providence, in said Rhode Island District, greeting.

Know ye, that reposing confidence in your wisdom, prudence and fidelity, we have appointed, and by these presents do authorize and empower you to take the answers to the interrogatories hereunto annexed of Amos W. Snow and Samuel Salisbury, to be used in a certain cause now pending in said court, wherein the Bank of the State of South Carolina is complainant against the Commercial Mutual Insurance Company and Bicknell & Skinner, defendants.

And to this end, at certain days to be by you appointed for that purpose, to cause said witnesses as aforesaid, to be brought before you, and each witness, while present before you, to examine carefully on oath, touching the premises. And when

you shall have taken the examination as aforesaid, to reduce, or cause the same to be reduced to writing, and to be subscribed by each of said witnesses in your presence. And the same, so taken and subscribed, to return, together, with this Commission and your doings herein enclosed, sealed and directed to the Circuit Court aforesaid, as soon as may be.

In testimony whereof, we have caused the seal of the said Circuit Court to be hereunto affixed.

Witness, the Honorable Roger B. Taney, our Chief Justice at Providence, this 18th day of May, in the year of our Lord one thousand eight hundred and fifty-eight.

HENRY PITMAN, *Clerk.*

N. B.—You shall not, except by the consent of the parties in writing, permit either party to attend at the taking of the depositions, either himself, or by any attorney or agent, nor to communicate by interrogatories or suggestions with the deponent whilst giving their depositions in answer to the interrogatories annexed to this commission. And you shall take such deposition in a place separate and apart from all other persons, and permit no person to be present during such examination, except the deponent and yourself, and such disinterested person (if any) as you may think fit to appoint as a clerk, to assist you in reducing the deposition to writing. And you shall put the several interrogatories and cross-interrogatories to the deponents in their order, and take the answer of the deponent to each, fully and clearly.

Rhode Island District, S. C.

In the city of Providence, on this 2d day of June, A. D. 1858, personally appeared Samuel W. Peckham, the within named Commissioner, and made oath that he would faithfully and impartially execute the within commission, according to the best of his skill and understanding. Before me,

HENRY PITMAN,
Clerk Circuit Court.

To the Hon. Circuit Court of the United States, within and for the Rhode Island District:

I, Samuel W. Peckham, the Commissioner named in the annexed commission, do respectfully report:

That, after having been duly sworn to the faithful and impartial execution of said commission, I did, on the 3d day of June, 1858, the day appointed by me for that purpose, cause to appear before me the witnesses named in said commission, Amos W. Snow and Samuel Salisbury, and them did severally examine carefully on oath and affirmation, under the interrogatories annexed to said commission, and did reduce their examination to writing in the

presence of each witness respectively, and caused the same to be subscribed by each witness respectively, in my presence, and their depositions, so taken and subscribed, I herewith return.

SAMUEL W. PECKHAM,
Commissioner.

Fees.—17 pages, $3 40
Swearing 2 witnesses, 20
—— $3 60

Interrogatories to Amos W. Snow.

Interrogatories to be propounded to Amos W. Snow, in the above entitled cause, on the part of the complainant.

First. What is your age and residence?

Second. Please state whether or not you now are, and were, during the year 1857, the Cashier of the City Bank of Providence.

Third. Please state whether or not you, as Cashier, received the Bill of Exchange now shown you from the complainant, with the request that it should be presented by you to Bicknell & Skinner for acceptance, and also for collection. If yea, please state when, and please annex a copy of said Bill of Exchange to this your deposition, and mark it A.

Fourth. Please state whether or not you presented said Bill of Exchange, or caused it to be presented to Bicknell & Skinner for acceptance. If yea, please state when, and whether it was accepted or not.

Fifth. Please state whether or not you are acquainted with Edward J. Bicknell and Darius S. Skinner, or either of them, whether you have ever seen them, or either of them, write, and whether you are acquainted with their, or either of their handwriting. If yea, please state whether the acceptance across the face of said Bill of Exchange is in the handwriting of either of them, and if so, of which.

Lastly. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause. If yea, set forth the same fully and at large in your answer.

Interrogatories to Samuel Salisbury.

Interrogatories to be propounded to Samuel Salisbury, in the above entitled cause, on the part of the complainant.

First. What is your age and residence?

Second. Please state whether or not you now are, and were, during the year 1857, a Clerk in the City Bank of Providence.

Third. Please state whether or not, to your knowledge, the Bill of Exchange now shown you was received at your bank from the complainant, with the request that it should be presented to Bicknell & Skinner for acceptance, and also for collection. If yea, please state when, and please annex a copy of said Bill of Exchange to your deposition, and mark it A.

Fourth. Please state whether or not you presented said Bill of Exchange to Bicknell & Skinner for acceptance. If yea, please state when, and whether it was accepted or not.

Fifth. Please state whether or not you are acquainted with Edward J. Bicknell and Darius S. Skinner, or either of them, whether or not you have ever seen them, or either of them write, and whether or not you are acquainted with their, or either of their handwriting. If yea, please state whether the acceptance across the face of said Bill of Exchange is in either of their handwriting, and if so, of which.

Lastly. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause. If yea, set forth the same fully and at large in your answer.

Deposition of Amos Snow.

AMOS W. SNOW, of the city of Providence, in the Rhode Island District, having been duly affirmed, deposes and says, in answer to the annexed interrogatories, as follows:

1. To the first interrogatory, he saith:

My age is fifty three; my residence the city of Providence.

2. To the second interrogatory, he saith:

I now am, and was, during that year, Cashier of that Bank.

3. To the third interrogatory, he saith:

I received a Bill of Exchange of the same tenor and date as that now presented to me. I received it in the usual way. There was no special request that I should present it for acceptance, but that is always understood. We received it on the 25th day of August, 1857. I have no doubt that this was the bill, as it is made payable to my order as cashier. I annex a copy, marked by me, A.

4. To the fourth interrogatory, he saith:

I caused it to be presented to Bicknell & Skinner for acceptance, on the 25th day of August, 1857, and it was accepted by them on that day, as I suppose, and as appears by the bill.

5. To the fifth interrogatory, he saith:

I am acquainted with both of them. I cannot call to mind now any time when I have seen them write, but I have no doubt that I have seen them both write. I should not think that I am

sufficiently acquainted with their handwriting, either of them, to affirm to their signatures, I could not say whether the acceptance across the face of said bill was in the handwriting of either of them.

6. To the sixth and last interrogatory, he saith:

What I have stated is all that occurs to me now that would have any bearing upon this cause.

A. W. SNOW.

Witness fee, 1 day, $1 50
1 mile travel, 10
—— $1 60

Subscribed and affirmed to, this 3d day of June, 1858.

SAML. W. PECKHAM,
Commissioner.

1st. $2400. CHARLESTON, So. Ca., 21 Augt. 1857.

Sixty days after sight of this first of exchange, (second unpaid,) pay to the order of myself, twenty-four hundred dollars, value received, and charge the same to account of shipt per Emily Ward.

Respectfully yours,
MICHL. LAZARUS.

To Messrs. Bicknell & Skinner, Providence, R. I.

Prov. Augt. 25, 1857. Accepted.
BICKNELL & SKINNER.

(Endorsed.)
MICHL. LAZARUS.

Pay A. W. Snow, Cash or order,
C. M. FURMAN,
President.

Marked A, by me,
A. W. SNOW.

Prov. Oct. 27, 1857. P. N. P. & D. & E. N.
HENRY MARTIN,
P. Notary.

Fees, $1 10
Postage, 3
—— $1 13

Deposition of Samuel Salisbury.

SAMUEL SALISBURY, of the city of Providence, in the Rhode Island District, having been duly sworn, deposes and says, in answer to the annexed interrogatories, as follows:

1. To the first interrogatory, he saith:

My age is forty; residence, the city of Providence.

2. To the second interrogatory, he saith:

I am, am now, and was then.

3. To the third interrogatory, he saith:

It was received, in the ordinary way, for acceptance and collection. Although not worded to that effect, that was the understanding. It was received on the 25th day of August, 1857. I annex a copy, marked by me, A.

4. To the fourth interrogatory, he saith:

I don't recollect of any instance when any was presented by any other person, therefore I believe it was presented by myself, on the 25th day of August, 1857. It was accepted on that day.

5. To the fifth interrogatory, he saith:

I am acquainted with both. I have seen both of them write. I am well acquainted with the handwriting of Mr. Bicknell, and not very well with that of Mr. Skinner. The acceptances is in the handwriting of Mr. Bicknell.

6. To the sixth and last interrogatory, he saith:

I don't know of anything. I don't think of anything.

SAML. SALISBURY.

Witness fee, 1 day,	$1 50	
1 mile travel,	10	
		$1 60

Subscribed and sworn to, this 3d day of June, 1858, before me,

SAML. W. PECKHAM,
Commissioner.

1st. $2400. Charleston, So. Ca., 21 Augt., 1857.

Sixty days after sight of this first of exchange, (second unpaid,) pay to the order of myself, twenty-four hundred dollars, value received, and charge the same to account of shipt. per Emily Ward.

Respectfully yours,
MICHL. LAZARUS.

To Messrs. Bicknell & Skinner, Providence, R. I.

Prov., Aug. 25, 1857. Accepted.

BICKNELL & SKINNER,
MICHL. LAZARUS.

(Endorsed.)

Pay A. W. Snow, Cas., or order,

C. M. FURMAN, *President.*

A. Marked by me, Prov., Oct. 27, 1857.

SAML. SALISBURY,
P. N. P. & D. & E. N.
HENRY MARTIN,
P. Notary.

Fees,	$1 10
Postage,	03
	$1 13

Commission.

United States of America,
Rhode Island District, *sc.*

The Circuit Court of the United States, within and for the Rhode Island District, to J. W. Hayne, William Simons, [L. S.] and J. C. Cochran, Esquires, of Charleston, in the State of South Carolina, or either of them, Greeting:

Know ye, That, reposing confidence in your wisdom, prudence and fidelity, we have appointed, and by these presents do authorize and empower you to take the answers to the interrogatories hereunto annexed, of Michael Lazarus and Charles M. Furman, to be used in a certain cause now pending in said Court, wherein the Bank of the State of South Carolina is complainant against the Commercial Insurance Company and Bicknell & Skinner, defendants.

And to this end, at certain days to be by you appointed for that purpose, to cause said witnesses, as aforesaid, to be brought before you, and each witness, while present before you, to examine carefully on oath touching the premises. And when you shall have taken the examination as aforesaid, to reduce, or cause the same to be reduced to writing, and to be subscribed by each of said witnesses in your presence. And the same, so taken and subscribed, to return, together with this commission, and your doings herein enclosed, sealed and directed to the Circuit Court aforesaid, as soon as may be.

In testimony whereof, we have caused the seal of the said Circuit Court to be hereunto affixed.

Witness, the Honorable Roger B. Taney, our Chief Justice, at Providence, this 18th day of May, in the year of our Lord one thousand eight hundred and fifty-eight.

HENRY PITMAN, *Clerk.*

N. B.—You shall not, except by the consent of the parties in writing, permit either party to attend at the taking of the depositions, either himself, or by any attorney or agent, nor to communicate by interrogatories or suggestions with the deponent whilst giving their depositions in answer to the interrogatories annexed to this commission. And you shall take such depositions in a place separate and apart from all other persons, and permit no person to be present during such examination, except the deponent and yourself, and such disinterested person (if any) as you may think fit to appoint as a clerk, to assist you in reducing the deposition to writing. And you shall put the several interrogatories and cross-interrogatories to the deponent in their order, and take the answer of the deponent to each, fully and clearly.

The State of South Carolina,
Charleston District.

Personally appeared, William Simons, one of the Commissioners named in the within commission, and was duly sworn for the faithful and impartial performance of the duties of said commission.

WILLIAM SIMONS.

Sworn to before me, this
27th day of May, 1858.

JNO. C. COCHRAN,
Notary Public.

The State of South Carolina,
Charleston District.

Personally appeared, J. Clarence Cochran, one of the Commissioners named in the within commission, and was duly sworn to the faithful and impartial discharge of the said commission.

JNO. C. COCHRAN.

Sworn before me, this
27th May, 1858.

WILLIAM SIMONS,
Notary Public, and of the Commissioners in this case.

Interrogatories to Michael Lazarus.

Interrogatories to be propounded to Michael Lazarus, in the above entitled cause, on the part of the complainant.

1st. What is your age and residence?

2d. State whether or not you are the Michael Lazarus referred to in the bill in this cause.

3d. Please look at the bill of lading now shown you, and state whether or not you received it from the agent of the Tern Emily Ward, for the cotton you shipped by said Tern to Bicknell & Skinner, and whether or not it is the one referred to in this suit? and please annex a copy of the same to this your deposition, and mark it A.

4th. Please look at the bill of exchange now shown you, and state whether or not it was drawn by you, and whether or not it is the one referred to in this suit; and please annex a copy of it to this your deposition, and mark it B.

5th. Please state whether or not you endorsed and delivered said bill of lading and said bill of exchange, to the complainant in this suit, meaning and intending thereby to transfer all your right, title and interest in said bill of exchange, and in the cotton which said bill of lading represented. If yea, please state when and for what consideration.

6th. Please state whether or not said bill of lading was

endorsed and delivered as above mentioned, as security for the payment of said bill of exchange.

7th. Please state whether or not, from the best of your knowledge, the complainant in this cause ever received payment of said bill of exchange from any person whatsoever.

8th. Please state whether or not Bicknell & Skinner were to sell the shipment of cotton referred to in this suit, for your sole benefit and advantage, and whether or not they acted as your agents and factors in relation to you.

Lastly. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause. If yea, set forth the same fully and at large in your answer.

Interrogatories to Charles M. Furman.

Interrogatories to be propounded to Charles M. Furman, in the above entitled cause, on the part of the complainant.

1st. What is your age and residence?

2d. Please state whether or not you now are, and were during the year 1857, the President of the Bank of the State of South Carolina, the complainant.

3d. Please state whether or not you are acquainted with Michael Lazarus, whether you have ever seen him write, and whether you are acquainted with his handwriting.

4th. Please look at the bill of lading and bill of exchange now shown you, and state whether or not the endorsement on the back of each, purporting to be that of Michael Lazarus, is in his handwriting, and please annex copies of the same to this your deposition, and mark them respectively A and B.

5th. Please state whether or not Michael Lazarus has delivered to you, as an officer of the complainant, or to any other officer of the complainant, to your knowledge, said bill of lading and said bill of exchange, so endorsed, with the intention of passing to the complainant his interest therein, and in the cotton which said bill of lading represents.

6th. Please state whether or not said bill of lading was endorsed and delivered, as before referred to, as security for the payment of said bill of exchange.

7th. Please state whether or not said bill of exchange, after having been endorsed and delivered, was duly forwarded for acceptance. If yea, please state when, and to whom it was sent.

8th. Please state whether or not the complainant ever received payment, from any person whatsoever, of said bill of exchange.

9th. Please state whether or not the complainant now holds said bill of exchange, and whether it is the owner thereof.

10th. Please state whether or not the endorsement on the back of said bill of exchange, purporting to be yours, as President, is yours.

Lastly. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause. If yea, set forth the same fully and at large in your answer.

Deposition of Michael Lazarus.

Answers to Interrogatories propounded to Michael Lazarus.

To first interrogatory, witness answers:

My age is seventy-one; my residence is Charleston.

To second interrogatory, witness answers:

I am the Michael Lazarus referred to in the bill in this case.

To third interrogatory, witness answers:

The bill of lading shown to me, marked A, is the one of three in the set drawn by myself, and handed to the agent of the Tern Emily Ward, and received back, signed by him.

To fourth interrogatory, witness answers:

The bill of exchange, marked B, I signed, and is the one referred to in this suit.

To fifth interrogatory, witness answers:

I did endorse and deliver said bill of lading and said bill of exchange to the compl inant in this suit, meaning and intending thereby to transfer all my right and title and interest in said bill of exchange, and in the cotton which said bill of lading represented. I have received, in consideration of which, the full amount of the same, being $2,400, less sixty days' interest and exchange, say $36, leaving $2,364, as credited in my bank book, 21st August last. The invoice of the forty-two bales of cotton per Tern Emily Ward, amounted to $2,745 67.

To sixth interrogatory, witness answers:

The bill of lading was endorsed and delivered, as above mentioned, for security for the payment of bill of exchange.

To seventh interrogatory, witness answers:

I have no knowledge that the complainant in this case ever received payment of said Bill of Exchange from any person whatsoever.

To 8th interrogatory, witness answers:

Bicknell & Skinner were instructed to sell the shipment of cotton referred to in this suit, for my sole advantage and benefit; they acted as my agents and factors in relation to me.

To 9th interrogatory, witness answers:

I will add that my custom is to ship to order; that I have made to Messrs. Bicknell & Skinner about fifteen or sixteen shipments,

all in that way, and that, too, since the date of 23d December 1856, when I received their account current to that date, showing a balance in my favor, of $1,180.17, for which I have received payment from them, since which I have received no account current from them, though frequently urged for the same. The balance due to me from them must be of some magnitude, growing out of short drafts on shipments of cotton, and on profits, as well as from returned protested drafts sold to the Bank of the State of South Carolina, on account of the shipments of cotton to them, and the proceeds not having been applied to the payment of the same. The 57 bales cotton reported as unsold by Messrs. Bicknell & Skinner, at the time of their failure, were part of the 59 bales per Ann & Susan, amounting to $3,475.52, as per invoice forwarded, and of 53 bales of cotton per schooner Tanner, amounting, as per invoice, to $2,909.88, the amount of 42 bales of cotton per Tern Emily Ward, as per invoice, $2,745.67. My shipments to Messrs. Bicknell & Skinner, $9,131.07, were covered, by open policy in their hands, with, I think, 10 per cent. profit.

MICHAEL LAZARUS.

Drafts against the	3400
	2850
Same unpaid,	2400
	8650

Exhibit A.

O O 34 bales
V 5
P 2
A 1
—
42 bales cot'n, wg. 18,561, or 442 pr. bale.

SHIPPED, in good order and well conditioned, by Michael Lazarus, on board the good Tern called the Emily Ward, whereof Bradley is Master for the present voyage, now lying in the port of Charleston, and bound for New York, to say, forty-two bales of cotton under deck, to be forwarded by Geo. R. Sheldon, Esq., New York, to Messrs. Bicknell & Skinner, Providence, R I., being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned, at the aforesaid port of New York (the danger of the seas only excepted), unto the order of the shipper, or to his assigns, he or they paying freight for the said cotton, twenty cents per 100 lbs., with primage and average accustomed. In witness whereof, the Master or Agent of the said vessel hath affirmed to three Bills of Lading, all of this tenor and date; one of which, being accomplished, the others to stand void.

Dated in Charleston, the 21st day of August, 1857.

T. I. KERR, *Agent.*

(Endorsed.) MICHAEL LAZARUS.

Exhibit B.

$2,400. CHARLESTON, S. C. 21st August, 1857.

Sixty days after sight of this first of exchange (second unpaid), pay to the order of myself, twenty-four hundred dollars, value received, and charge the same to account of shipment per Emily Ward.

Respectfully yours,
MICHAEL LAZARUS,

To Messrs. BICKNELL & SKINNER, Providence, R. I.

(Endorsed,) MICHAEL LAZARUS.

Providence, August 25th, 1857. Accepted.
BICKNELL & SKINNER.

Pay A. W. Snow, Cas., or order.
C. M. FURMAN, *President.*

Providence, October 27, 1857. P. N. P. & D. & E. N.
HENRY MARTIN, *Notary.*

Fees,	$1.10
Postage,	03
	$1.13.

Deposition of C. M. Furman.

Answers to the interrogatories propounded to C. M. Furman, in the above entitled cause, on the part of the complainant.

To 1st interrogatory, witness answers:

My age is sixty; my residence is Charleston, S. C.

To 2d interrogatory, witness answers:

I was and am President of the Bank of the State of South Carolina.

To 3d interrogatory, witness answers:

I know Michael Lazarus very well. He is a native and old resident of Charleston. I know his handwriting; have done considerable business with him.

To 4th interrogatory, witness answers:

I have looked at the Bills of Lading and Bills of Exchange, and am satisfied that the endorsements are in the handwriting of Michael Lazarus.

To 5th interrogatory, witness answers:

Mr. Lazarus delivered the Bill of Lading and the Bill of Exchange, either to me or to the proper officer of the bank. The object was to pay for his interest in the cotton, and to secure to the complainant the payment of the Bill of Exchange, upon which funds had been advanced by complainant to Mr. Lazarus, to enable him to pay for the cotton.

To 6th interrogatory, witness answers:
It was.
To 7th interrogatory, witness answers:
It was forwarded to , on the day of 1857.
To 8th interrogatory, witness answers:
Complainant has never received payment of the Bill of Exchange.
To 9th interrogatory, witness answers:
Complainant still holds the Bill, and is bona fide owner of it.
To 10th interrogatory, witness answers:
It is.
To last interrogatory, witness answers:
I know of nothing further, material to the advantage or benefit of the parties at issue in this cause.

C. M. FURMAN.

To the Honorable the Circuit Court of the United States, within and for the Rhode Island District.

STATE OF SOUTH CAROLINA, }
Charleston District. }

I, William Simons, one of the Commissioners named in the Commission hereto annexed, respectfully report: That, after having been duly sworn to the faithful and impartial performance of my duties under the same, I met the parties on yesterday (27th May), and with Mr. J. C. Cochran, the other Commissioner, took the depositions, agreeably to the within interrogatories, of Michael Lazarus and Charles M. Furman, for the complainant in the within named suit in equity, which depositions are herewith returned. The deponents, before testifying, were duly sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing, in the presence of each deponent respectively, and by them respectively signed in my presence, no person being present at the taking of said depositions, but the deponents respectively, Mr. Cochran and myself.

WILLIAM SIMONS,
Commissioner.

Fees, $10 for each witness.

To the Honorable the Circuit Court of the United States, within and for the Rhode Island District.

STATE OF SOUTH CAROLINA, }
Charleston District. }

I, John Clarence Cochran, one of the Commissioners named in the Commission hereto annexed, respectfully report: That, after having been duly sworn to the faithful and impartial performance of my duties under the same, I met the parties, on the 27th day

of May, A. D. 1858, and took the depositions, agreeably to the within interrogatories to Charles M. Furman and Michael Lazarus, for the Bank of the State of South Carolina, complainant in the within-named suit in equity, which depositions are herewith returned. The deponents, before testifying, were duly sworn, or affirmed, to testify the truth, the whole truth, and nothing but the truth, and the depositions were by Mr. William Simons (the other Commissioner) reduced to writing in my presence, and in the presence of each deponent respectively, and by them respectively signed in my presence; no person being present at the taking of said depositions but the deponents respectively and myself.

Done at Charleston, S. C., May 27th, 1858.

JOHN C. COCHRAN,
Commissioner.

Fees, $10 for each witness.

And said cause, being continued from term to term, until the June Term of said Court, A. D. 1859, it was then called for hearing, and heard upon the Bill, Answer, and Depositions filed in said cause, and held by said court, for advisement.

And said cause, being further continued until the present June Term, A. D. 1860, the court delivered an opinion in said cause, and ordered the following decree to be entered.

Decree.

This cause came on to be heard at the June Term of this Court, A. D. 1859, and counsel were heard thereon, and thereupon it is ordered, adjudged and decreed, by the court here, that said bill of complaint be, and the same is, hereby dismissed with costs.

Entered as the decree of this court, per order thereof, this eleventh day of September, A. D. 1860.

HENRY PITMAN, *Clerk.*

Whereupon the complainants entered the following

Prayer for an Appeal.

The complainants now in open court pray an appeal from the Decree entered against them.

By their Attorney,
T. A. JENCKES.

Allowed by order of court, this 11th day of September, A. D. 1860.

HENRY PITMAN, *Clerk.*

And on the 20th of September, 1860, was filed the following:

Bond on Appeal.

Know all men, by these presents, that we, the Bank of the State of South Carolina, a corporation created by the Legislature of said State as principal, and Strubail Hutchens, of Providence, in the State of Rhode Island, as surety, are held and firmly bound

unto Edward J. Bicknell and Darius S. Skinner, and to the Commercial Mutual Insurance Company, all of said Providence, in the full and just sum of two hundred and fifty dollars, to be paid to the said Edward J. Bicknell and the Commercial Mutual Insurance Company, their heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty.

Whereas, lately, at the term of the Circuit Court of the United States, held within and for the District of Rhode Island, on the 15th day of June, A. D. 1860, in a suit in equity, depending in said court, between the Bank of the State of South Carolina, as complainants, and Bicknell & Skinner, and the Commercial Mutual Insurance Company, as defendants, a final decree was rendered against the said complainants, and the said complainants thereupon prayed an appeal, which was heard and allowed in open Court at said term, and the said cause was thereupon appealed to the Supreme Court of the United States, at their term to be holden in the city of Washington, on the first Monday of December, A. D. 1860,

Now the condition of the above obligation is such, that if the said Bank of the State of South Carolina shall prosecute their appeal with effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

The Bank of the State of South Carolina,
[L. S.] By T. A. JENCKES, their Attorney in fact.

STRUBAIL HUTCHENS. [L. S.]

Sealed and delivered in presence of

B. B. HAMMOND.

United States of America, }
Rhode Island District. } *ss.*

CLERK'S OFFICE, CIRCUIT COURT,
Providence, Sept. 27th, 1860.

I, Henry Pitman, Clerk of the Circuit Court of the United States, for the first Circuit, within and for the Rhode Island District, do hereby certify the foregoing to be a true copy of the entire record, and all the proceedings in the cause in equity: "The Bank of the State of South Carolina *vs.* The Commercial Mutual Insurance Company," wherein a decree was rendered at the June Term of said Court, 1860.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said Court, on the day and year above written.

HENRY PITMAN, *Clerk.*